

MILITARY LAW REVIEW

Minor Symposium

Biological Warfare — Two Views

UNITED STATES USE OF BIOLOGICAL WARFARE

Major William H. Neinast

THE STATUS OF BIOLOGICAL WARFARE
IN INTERNATIONAL LAW

Colonel Bernard J. Brungs

Article

THE SOLDIER'S RIGHT TO A PRIVATE LIFE

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Survey of the Law

ANNUAL SUPPLEMENT TO THE SURVEY OF
MILITARY JUSTICE: THE OCTOBER 1962 TERM OF THE
U.S. COURT OF MILITARY APPEALS

HEADQUARTERS, DEPARTMENT OF THE ARMY

APRIL 1964

PREFACE

The *Military Law Review* is designed to provide a medium for those interested in the field of military law to share the product of their experience and research with their fellow lawyers. Articles should be of direct concern and import in this area of scholarship, and preference will be given to those articles having lasting value as reference material for the military lawyer.

The *Military Law Review* does not purport to promulgate Department of the Army policy or to be in any sense directory. The opinions reflected in each article are those of the author and do not necessarily reflect the views of The Judge Advocate General or the Department of the Army.

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THOMAS EDWARDS

Judge Advocate General

1782—1783

Colonel Thomas Edwards was born in Boston, Massachusetts, on 1 August 1753, the son of John and Abigail Edwards. In 1760 he entered Boston Latin School and upon his graduation therefrom entered Harvard College in 1771. Subsequent to his graduation from Harvard College he read law in the office of John Williams of Boston, then a leading practitioner in Massachusetts. He was later admitted to practice in Boston.

An ardent patriot, Edwards soon joined the cause of the revolution and on 31 May 1776 was commissioned a lieutenant in the 16th Massachusetts Infantry. The 16th Massachusetts Infantry was considered to be one of the finest regiments of the Continental Army. During hostilities Colonel Edwards took part in the Battles of Monmouth and Springfield, New Jersey, and Quaker Hill, Rhode Island.

When Colonel John Lawrence resigned his position as Judge Advocate General of the Army at the close of the War of Independence, no successor **was** immediately found for him. On July 9, 1782, Congress elected James Innis of Virginia to the position, but Innis declined it. On July 11, 1782, Congress increased the pay of the Judge Advocate General, fixing it at \$75.00 per month, and adding \$12.66 per month for subsistence, and an additional \$6.66 per month for a servant to whom would also be allowed rations and clothing equivalent to a private in the Army. Besides **all** this, a two horse wagon and forage for two saddle horses were permitted. On October 2, 1782, Congress elected Lieutenant Thomas Edwards, then of the 9th Massachusetts Infantry, **as** Judge Advocate General of the Army, with the rank of colonel.

Colonel Edwards retained his position as Judge Advocate General of the Army until November 3, 1783, when he resigned his position and returned to the practice of law in Boston.

In June 1784 the remnants of the Continental Army were disbanded and the permanent standing Army limited to 80 enlisted men and their officers. This tiny force was expanded somewhat in succeeding years but no successor to Colonel Edwards was appointed prior to the adoption of the Constitution of the United States.

Following his return to civilian life, Colonel Edwards held various municipal offices in the city of Boston. According to *The*

Memorials of the Massachusetts Society of the Cincinnati (1931), he was “. . . a useful and exemplary citizen and a man of sterling integrity of character.” He served as Secretary of the famous Society of the Cincinnati from 1786 until his death in 1806. He was survived by seven children, the progeny of two marriages.

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BIOLOGICAL WARFARE—TWO VIEWS

The possibility of the use of biological warfare in any future war raises important questions about its legality. Presented herein are two divergent views as to the legality of biological warfare under present international law and as to what that legality ought to be. While The Judge Advocate General's School does not adopt or endorse either position, they are presented here with a view toward stimulating legal research and analysis in this field and with the hope that additional inquiry into the subject may be made by international lawyers, both military and civilian. The importance of the questions discussed here cannot be overstated.

UNITED STATES USE OF BIOLOGICAL WARFARE*

BY MAJOR WILLIAM H. NEINAST**

I. INTRODUCTION

The ability to engage in biological warfare is, today, a reality.¹ Discussions on biological warfare are available in the United States in both technical and non-technical materials. The ethical, the legal, and the practical aspects are favorite topics of discussion.

These topics are approached in one of three ways.

* This article was adapted from a thesis presented to The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia, while the author was a member of the Eleventh Career Course. The opinions and conclusions presented herein are those of the author and do not necessarily represent the views of The Judge Advocate General's School or any other governmental agency.

** JAGC, U.S. Army; Office of the Staff Judge Advocate, Headquarters, III U.S. Army Corps and Fort Hood, Fort Hood, Texas; A.B., 1950, University of Texas; LL.B., 1962, University of Texas; admitted to practice in the State of Texas, and before the United States Supreme Court and United States Court of Military Appeals.

¹ See, e.g., U.S. DEP'T OF ARMY FIELD MANUAL NO. 3-5, TACTICS AND TECHNIQUES OF CHEMICAL, BIOLOGICAL AND RADIOLOGICAL (CBR) WARFARE (1958) [hereafter cited as FM 3-5], para. 116; U.S. DEP'T OF ARMY, TECHNICAL MANUAL NO. 3-216, MILITARY BIOLOGY WARFARE AGENTS (1956) [hereafter cited as TM 3-216], paras. 3, 7. "Biological warfare" is used in this article in preference to "bacteriological warfare." The latter, or "germ warfare," would be limited to the use of bacteria. Biological warfare, however, includes the use of bacteria, other micro-organisms, higher forms of life, such as insects and other pests, and the toxic products of these agents.

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First, some consider biological warfare so horrible, so terrifying, that it should not be allowed under any **circumstances**.²

Secondly, others think that biological warfare has been grossly overrated. It is argued that biological warfare is directed toward temporary incapacitation rather than the permanent disability or death which results from more conventional weapons, and thus the arguments on the legality or morality of this type of warfare are regarded as **exaggerated**.³ This second position is also maintained by those who argue that the means of waging biological warfare are ineffective weapons against which there are effective defenses, and therefore biological warfare has no military utility.⁴

² "Any country which really desires peace would limit rather than enlarge the means of human slaughter. This applies with special force to a destructive force which has such frightful possibilities." So spoke Rep. Burton of Ohio before the House of Rep. of the U.S. on Jan. 19, 1927 (68 CONG. REC. 1969). He was speaking in behalf of his proposed amendment to a War Dep't appropriations bill to reduce the amount of money being appropriated for the Chemical Warfare Service to "produce, manufacture, and test chemical warfare gases or other toxic substances." The remarks were directed primarily at the U.S.'s failure to ratify the Geneva Gas Protocol of June 17, 1925.

"But the **surest** clue to the state of world morality is to be found in the attitude toward the horror-weapons, and in the failure to take any effective measures **against** their spread. . . . But we do know that there **has** been much talk of . . . disease **germs** to bring the terrors of pestilence to entire populations. . . . [T]he fact remains that they , . . are mentioned as if they **represent** no more than new methods of exterminating houseflies . . . there appears to be little realization that they are as antihuman, as diabolical **as** the Satan of old demonlore could ever have conceived. COBLENTZ, FROM ARROW TO ATOM BOMB 460 (1953). The Same author in 1927 predicted the use of 'pestilence breeders of bacteriology' in the 'next war.' " COBLENTZ, MARCHING MEN 450, 454 (1927).

³ "[CBR chemical, biological, radiological warfare] is not a monstrosity born of the devil. CBR need not be a killer. In fact, much emphasis is laid upon temporary incapacitation from which the victim recovers completely." 106 CONG. REC. 2117-2118 (1960) (Remarks of Rep. Sikes). "To me there is something inconsistent in singling out gases, chemicals, bacteria and atoms and putting them outside the pale of international law, while other means of destruction accounted for some 40,000,000 dead and wounded in 1939-45 ENOCK, THIS WAR BUSINESS 96 (1951).

⁴ "Preventive disease knowledge has never been more advanced. And so the present time is the least propitious of all in history for any nation to attempt **germ** warfare. . . .

"All **manner** of germs and germ agents occur in abundance permanently in Korea; that is, the diseases which they **cause** are endemic. No more **serious** health hazards than already exist could have been created had germ warfare been waged against our troops. . . . Our methods of disease control . . . may be counted on to be **successful** against either neighborly or belligerent germs.

"Neither new diseases nor **germs** for new **diseases** can be produced at will. They are not manufacturable like airplanes or bombs, nor **can** they be trained like bloodhounds. Even if new forms of infective agents are experimentally developed, measures for their defense, both individual and populationwise, will simultaneously advance." Raymond W. Bliss, Maj. Gen. USA (Ret.), former Surgeon General of the Army, *Germ Warfare*, Atlantic Monthly, Nov. 1962, pp. 55-57.

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The third approach requires that each means of biological warfare be considered as a separate weapon. This approach considers biological warfare to have a wide range. Horrible and ineffective weapons are at one extreme. Through the spectrum at the other end are found weapons which produce acceptable amounts of suffering and disability in relation or proportion to the desired military objective. Thus, separate conclusions may be required for each means of biological warfare.⁶ This third approach represents the most objective opinion.

From the available discussion, it may be assumed that biological warfare is a distinct possibility in any war pitting the United States against the Soviet Union. Both of these giants, however, would consider several factors before resorting to such warfare: What military advantages can be gained by a use of biological warfare? What political advantages or disadvantages are possible through such means? What are the moral or humanitarian aspects of biological warfare? Is biological warfare legal?

This article will attempt to answer the last question, exploring specifically the legality of use by the United States of biological warfare in any future conflict.

One word of caution must be added before starting the formal inquiry. Any practical person approaching this subject should keep foremost in his mind the following common sense approach:

...[I]f it should ever come to an all-out contest by force between the super-Powers of our age, it would be sheer day-dreaming to expect that in their fight for survival, and so necessarily world hegemony, they would refrain from the use of any weapon in their arsenal.

...At this point, the first, and most self-denying, duty of the international lawyer is to warn against the dangerous illusion that his findings on the legality or illegality of nuclear weapons are likely to influence one way or the other, the decision on the use of these devices of mechanized barbarism.⁶

Although this admonition was originally written in relation to nuclear weapons, it applies with equal validity to biological warfare. The legality of biological warfare may be one of the considerations affecting the decision to employ such tactics, but it will not be the controlling factor.

11. THE HISTORY AND POSSIBLE FUTURE OF BIOLOGICAL WARFARE

A. HISTORY

Hand-to-hand fighting is the oldest surviving means of combat.

⁵ See O'Brien, *Biological/Chemical Warfare and the International Law of War*, 51 *GEO. L. J.* 1 (1962).

⁶ SCHWARZENBERGER, *THE LEGALITY OF NUCLEAR WEAPONS* 58-59 (1958).

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As guns using black powder were not invented until early in the 14th Century,⁷ biological warfare may be the second oldest means. Primitive forms of biological warfare are recorded as facts of that century. Bodies of plague victims thrown over the walls of a fortress in Crimea during the 14th Century by the Tartars forced the defending Italians to abandon their stronghold. The latter learned a lesson from this experience and included instructions in a manual of the 16th Century for constructing artillery shells for the delivery of disease to the enemy.⁸

Biological warfare is not a stranger to the American continent. European traders reportedly gave the blankets of smallpox victims to the Indians in North America during the colonial days in an effort to reduce their fighting strength. More than a century later, during World War I, German agents in the United States sent disease to Europe by infecting animals shipped there.⁹

Germany's biological warfare during World War I was not confined to the United States. It is alleged that the Germans and the Austrians dropped garlic and sweets infected with cholera bacilli in Rumania and Italy during the war,¹⁰ that they infected Rumanian cavalry horses with glanders,¹¹ and that they infected wells with disease in the South-West African campaign of 1915.¹²

Research into the means of waging biological warfare was conducted in Germany, Russia, and Japan during the 1930's.¹³ The United States got a belated start in such research, but did carry it on during World War II.¹⁴

Since World War II the United States has had a continuing program of research in biological warfare. Chemical-biological warfare research resulted in the death of three Americans in the ten years before 1960. This research was costing from 35 to 40 million dollars a year, or about one-tenth of one percent of the then current defense budget.¹⁵

⁷ 11 ENCYC. BRITANNICA, *Gunpowder* 7 (1962).

⁸ H.R. REP. NO. 815, 86th Cong., 1st Sess. 5 (1959).

⁹ *Ibid.*

¹⁰ See SPAIGHT, *AIR POWER AND WAR RIGHTS* 191 (3d ed. 1947).

¹¹ See H.R. REP. NO. 815, 86th Cong., 1st Sess. 5 (1959).

¹² See HALL, *INTERNATIONAL LAW* 636 n. 1 (8th ed., Higgins ed. 1924).

¹³ See H.R. REP. NO. 815, 86th Cong., 1st Sess. 5 (1959).

¹⁴ See BROPHY, MILES & COCHRANE, *U.S. ARMY IN WORLD WAR II—THE TECHNICAL SERVICES—THE CHEMICAL SERVICE: FROM LABORATORY TO FIELD 101-121* (1959). See generally BROPHY & FISCHER, *U.S. ARMY IN WORLD WAR II—THE TECHNICAL SERVICES—THE CHEMICAL WARFARE SERVICE—ORGANIZING FOR WAR* (1959).

¹⁵ H.R. REP. NO. 815, 86th Cong., 1st Sess. 14 (1959).

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The Soviet Union is among the other great powers preparing for biological warfare.¹⁶ A Russian Army officer stated:

It is true that a future war will to a significant degree be an atomic-hydrogen war, and perhaps a chemical and bacteriological one, too. It is true that a contemporary war is a war of the physical, chemical and biological sciences, of the technical sciences, of science in general.¹⁷

This statement was made in the only country that has conducted a war-crimes trial on charges of engaging in biological warfare.¹⁸ The label "war crime" resulting from the Russian trial of the Japanese has had no apparent effect on developing means of conducting biological warfare.

In conflicts subsequent to World War II there were charges of, and actual use of, biological warfare. For instance, the Korean Conflict gave rise to charges that the United Nations Forces, to which the United States made the greatest contribution, were engaging in biological warfare. These charges, however, were successfully refuted.¹⁹ There can be no such refutation or denial in Viet Nam. The United States is employing a method of warfare there that is described in its own military manuals on biological warfare. Guerrillas conduct the war in that country. Small bands of armed men raid Vietnamese points, then easily lose themselves in trails hidden by heavy jungle foliage. American technicians exposed these trails by spraying the areas with a chemical that defoliates the vegetation, but refused the urgings of the Republic of Viet Nam to use similar methods against the mainos

¹⁶ A biological warfare capability is not limited to States in one of the two blocs of the East-West bipolarization. The United Arab Republic reputedly is developing missiles with "bacteriological and poison gas warheads." This has led to charges that "the Egyptians are experimenting with genocidal weapons." A-Threat to Israel Began in 1954 When Germans Arrived in Egypt, Washington Post, March 24, 1963, p. A17, col. 1; Rockets in Egypt, Newsweek, April 15, 1963, p. 50.

¹⁷ Col. I Baz, The Military Herald (Voennyi Vestnik)—the principal Soviet Army journal—No. 6, June 1958, as translated and reprinted in GARTHOF, THE SOVIET IMAGE OF FUTURE WAR, Appendix A, 100 (1959).

¹⁸ Following World War II, 12 former members of the Japanese Army were convicted (inter alia) of preparing and using bacteriological weapons between 1939 and 1942. The weapons included those of typhoid, paratyphoid, cholera, anthrax, and plague. The accused were convicted although Japan did not ratify the Geneva Gas Protocol of 1925. GREENSPAN, THE MODERN WAR OF LAND WARFARE 358 n. 184 (1959).

¹⁹ These charges and their refutation are discussed infra, at pages 33–36. For a brief history, see BECHHOEFER, POSTWAR NEGOTIATIONS FOR ARMS CONTROL 194–201 (1961). For the official U.S. position, see Vols. 26, 27, & 28, DEP'T OF STATE BULL. (1951, 1952, & 1953).

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and rice crops of the Communist guerrillas.²⁰ Attacking the crops would have been "chemical" warfare in its strictest sense, but it could also be referred to as biological warfare²¹ and is treated as such as a matter of convenience in publications of the United States Army.²² Moreover, the Viet Cong or Communist guerrillas are currently using the crudest form of biological warfare. A primary means of protecting their defensive positions is the *panji*. These are camouflaged pits with needle-sharp bamboo stalks imbedded in their bottoms. The traps are mined with hand grenades, and the defenders "usually urinate or defecate on the tips of the *panji*'s slivers in hopes of inducing fatal infection or tetanus in victims."²³

B. THE FUTURE OF BIOLOGICAL WARFARE

After this brief history of, biological warfare, one can but wonder what will be the next use of biological warfare. Its future, so far as the United States is concerned, is problematical.

1. *Non-adherence of the United States to the Geneva Gas Protocol.*

The so-called Geneva Gas Protocol²⁴ which prohibits "bacteriological" warfare is binding on a reciprocal basis among parties to the convention only. The United States, which ranks high among states in the preparation for biological warfare, has not ratified the Geneva Gas Protocol, but will most likely be engaged in any

²⁰ Bigart, *U.S. Shuns Harm to Vietnam Food*, N.Y. Times, Jan. 26, 1962, p. 2, col. 7. The Chinese and Russians have made similar charges more recently. Tuckman, *Reds Trumpet New Charges of Viet "Germ War,"* Washington Post, March 10, 1963, p. A10, col. 3. Excerpts from the latest charges are:

"A broadcast dispatch from Hanoi charged that chemicals were sprayed in the Vietnamese war 'to poison innocent South Vietnamese people and devastate crops.' . . .

"The Moscow article said 'American interventionists have again used poison substances in South Viet-Nam. Hundreds of people perished, great quantities of cattle were poisoned. . . .'

"The article said the United States 'noticeably raised' its production of chemical and bacteriological materials in 1962. . . ."

²¹ See H.X. REP. No. 815, 86th Cong., 1st Sess. 7 (1959).

²² See TM 3-216, at 2, 6, 33, 34.

²³ See Bashore, *Soldier of the Future*, SPECIAL WARFARE—U.S. ARMY 32 (1962) (a booklet prepared by the Office, Chief of Information, U.S. Dep't of Army) :

"During one action a South Vietnam infantry battalion lost one man by a poisoned arrow, 10 wounded by *panji* traps. During this two-day fight no casualties were inflicted by bullet or bayonets."

²⁴ Protocol Prohibiting the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare signed on June 17, 1925, 94 L.N.T.S.65 [hereafter cited as the Geneva Gas Protocol].

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major war of the future. This is one thing that makes the future use of biological weapons by the United States **problematical**.²⁵

2. *Alliances of the United States.*

The United States' alliances with other states that are adherents to the Geneva **Gas** Protocol add another **problematical element**.²⁶ That protocol, as will be discussed more **fully later**,²⁷ is basically a contractual agreement that the adherents will not be the first to use chemical or "bacteriological" warfare in conflicts among themselves. Generally, the major adherents to the Protocol cease to be bound by its prohibitions if biological warfare is waged against them.²⁸

The dilemma thus presented to the United States *vis-a-vis* some of her allies is reflected in the publications of two of its military departments. Both the Army's and the Navy's manuals on the laws of war simply state that the United States is not bound by a conventional prohibition against biological warfare.²⁹ Both manuals acknowledge the existence of the Geneva Gas Protocol, and the Navy manual refers to the nature and effect of the **reservations** by Great Britain, France, and Russia. But neither manual discusses whether the United States can or will use biological weapons as part of an operation by the North Atlantic Treaty Organization.³⁰ Moreover, **as** has been noted in relation to the

²⁵ STONE, **LEGAL CONTROLS OF INTERNATIONAL CONFLICT** 557 (1954).

²⁶ There are **46** adherents. See Brungs, *The Status of Biological Warfare in International Law*, *infra* at **47, 50 n. 73**. The U.S. is involved in some type of defensive alliance or arrangement with at least **23** of these adherents.

²⁷ See pages **28-30** *infra*.

²⁸ See, for example, Russia's reservation to the Protocol which reads:

"(1) The said Protocol only binds the Government of the Union of Soviet Socialist Republics in relation to the States which have signed and ratified or which have definitely acceded to the Protocol.

"(2) The said Protocol shall cease to be binding on the Government of the Union of Soviet Socialist Republics in regard to all enemy States whose forces **or** whose allies *de jure* **or** in fact do not respect the restrictions which are the object of this Protocol." **94 L.N.T.S. 67 (1929)**. Of the **25** ratifications **or** adherences listed in that volume, France, Belgium, Rumania, Great Britain, India, Canada, South Africa, Australia, and New Zealand filed similar reservations. The others, with the exception of Spain, acceded without reservation. Spain's unique reservation provides :

"Declares **as** compulsory *ipso facto* and without special agreement in relation to any other member **or** State accepting and executing the same obligation, that is to say, on the **basis** of reciprocity, the [Protocol] . . ."

²⁹ See **U.S. DEP'T OF ARMY, FIELD MANUAL 27-10, LAW OF LAND WARFARE** [hereafter cited as **FM 27-10**], para. **38 (1956)** ; **U.S. DEP'T OF NAVY, LAW OF NAVAL WARFARE** [hereafter cited as **LAW OF NAVAL WARFARE**], para. **612 (1969)**.

³⁰ **For** a view which regards this **as** a problem of eminent importance, see Moritz, *The Common Application of the Laws of War Within the NATO Forces*, **13 MIL L. REV. 1, 21-22 (1961)**.

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Army's manual,³¹ both manuals are careful not to assert a right on the part of the United States to use biological weapons. If such a right exists, will it, or should it, be asserted by the United States? The answer is not easy. It is basically a political decision which, depending on the circumstances existing when the decision is made, may or may not be influenced by the legality of biological warfare. Therefore, the inquiry "will" or "should" biological warfare be used by the United States will not be pursued. Instead, the inquiry will be simply: Can the United States legally engage in biological warfare?

3. *The Untested Nature of Biological Warfare.*

The untested nature of biological warfare adds a third problematical element. Notwithstanding the long history of biological warfare, it has not been used as an effective strategic or tactical means of waging war. A similar uncertainty about the use of gas in war was the basis of the United States' opposition to the Hague Gas Declaration of 1899.³² The United States' delegation to the conference which produced that declaration stated that since no gas-emitting shell was in practical use, "a vote taken would be taken in ignorance of the facts."³³ This is a sound position from the viewpoint of lawyers trained by the nature of their profession to "get the facts" before acting.

Have not the facts concerning the devastation wrought by bacteria long been known? As a matter of medical practice, the answer must be "Yes!" We are concerned here, however, with the controlled use of bacteria as weapons of war. The facts in that regard are not known. Thus it behooves all concerned to make haste slowly. A decision to outlaw biological warfare *in toto* or to recognize no prohibitions on its use could have undesirable consequences later.³⁴

³¹ GREENSPAN, *op. cit. supra* note 18, at 357. See also, Fratcher, *New Law of Land Warfare*, 22 MO. L. REV. 143, 149 (1957).

³² See HAGUE CONVENTIONS AND DECLARATIONS OF 1899 AND 1907, at 225 (2d ed., Scott ed., 1915).

³³ INSTRUCTIONS TO THE AMERICAN DELEGATES TO THE HAGUE PEACE CONFERENCE AND THEIR OFFICIAL REPORTS 3637 (Scott ed. 1916).

³⁴ "Advancing technology . . . has given the advantage alternately to offensive and to defensive weapons. A great danger illustrated many times is for a nation once powerful to continue to rely on outmoded concepts. It is thus that many great states have been toppled in the past." H.R. REP. NO. 815, 86th Cong., 1st Sess. 1 (1959).

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III. DESCRIPTION OF BIOLOGICAL WARFARE³⁵

A. BIOLOGICAL WARFARE AND CHEMICAL WARFARE DISTINGUISHED

Biological warfare is not chemical warfare. This truism should be constantly stressed. Unfortunately, however, the tendency has been to blur the distinction between the two means of warfare rather than to clarify it and make it a permanent division.

There are certain similarities in the two systems that are the cause of this blurring. For example, in the United States Army one service, the Chemical Corps, is responsible for developing chemical and biological weapons. Gas, one of the principal forms of chemical warfare, kills or incapacitates without destroying property.³⁶ Biological agents act in the same manner. Both chemical and biological agents are search weapons. They penetrate ordinary positions of strength and conventional shelters to act on conveniently grouped victims.³⁷

There are certain basic differences between chemical and biological agents, however, which require that the two be treated separately for the purpose of legal analysis.

Notwithstanding their initial potency, chemical weapons are generally limited to battlefields of a few hundred square miles, whereas biological weapons can cover thousands of square miles in an attack. Within this much larger affected area, biological weapons could bring everything to a standstill by incapacitating—but not necessarily killing—10 to 20 per cent of the population. The effects would be quite different from a normal epidemic, because the biological agents would strike the entire population at precisely the same time. Hence doctors, nurses, transportation workers, and so on would be incapacitated at the same time.³⁸

Related to the foregoing is the fact that biological agents multiply after dissemination.³⁹ This permits biological agents to have

³⁵ Compare *The Ultimate Weapon?*, Newsweek, March 4, 1963, p. 56. Those with access to classified material on this subject may consider the following description woefully inadequate. Nevertheless, the purpose of this section is to give as full a description as possible from unclassified sources, in order to enable all readers to understand clearly the nature of biological warfare.

³⁶ Kelly, *Gas Warfare in International Law*, 9 MIL. L. REV. 1, 18 (1960).

³⁷ H.R. REP. No. 815, 86th Cong., 1st Sess. 11 (1959).

³⁸ O'Brien, *supra* note 5, at 10 n. 17; J. H. Rothschild, Brig. Gen. USA (Ret.) [former Commanding General of the Chemical Corps' Research and Development Command] *Germs and Gas*, Harper's, June 1959, p. 32-33. According to another comparison, only 450 pounds of a concentrated biological agent would blanket 34,000 square miles while a 20-megaton nuclear device would cause severe burns within a mere 2,800 square miles. See *The Ultimate Weapon?*, Newsweek, March 4, 1963, p. 56.

³⁹ TM 3-216, para. 41.

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wider coverage than chemical agents, as mentioned above, and, under circumstances, it makes them more persistent agents than chemical agents.

Field detection of biological agents is not currently possible, but the presence of chemical agents can be detected on a battle field.⁴⁰

Not only is there a problem of detection of biological agents in the field, but it is harder to defend against them than to defend against chemical agents. It has been stated in this regard that the protective mask for biological warfare had to be 1,000,000 times more efficient than the standard service gas mask issued by the United States Army during World War II.⁴¹

While there may be other distinctions, these four are of primary concern in this article. These distinctions have both legal and military significance. Their legal significance will be discussed later.

Militarily, biological agents have peculiar characteristics which favor them in comparison with other types of weapons. Relatively minute amounts of them are required, as they are living and can multiply in the victim. Due to the difficulty in detecting and recognizing them, there is a slowness in the identification of them as a war weapon in the area. They have a delayed action and a spread or epidemic potential. Finally, they are suitable for subversion and **sabotage**.⁴²

The characteristics of biological weapons that make them unique instruments of war are obvious. Yet lawyers and laymen, military personnel and civilians continue to treat biological warfare and chemical warfare in the same breath. This is difficult to understand. But to make matters worse, a third element—radiological warfare—is usually thrown in. CBR—Chemical/Biological/Radiological Warfare—is the *accepted* term. This is the same as referring consistently to tame chickens, domesticated pheasant, and wild ducks as “fowl” without any hint of the vast differences between those three members of the same animal family.

B. *THE FACTS OF BIOLOGICAL WARFARE*

Just what is biological warfare? It is basically antipersonnel warfare.⁴³ It is the intentional use of “pathogenic bacteria, fungi, viruses, rickettsia, and their toxic products, as well as certain chemical compounds, for the purpose of producing disease or

⁴⁰ *Ibid.*

⁴¹ See BROPHY, MILES & COCHRANE, *op. cit. supra* note 14, at 118.

⁴² TM 3-216, para. 120.

⁴³ TM 3-216, para. 4; O'Brien, *supra* note 5, at 9.

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death in men, animals, or crops.”⁴⁴ The nature of biological warfare makes it difficult to defend against. Biological agents cannot be seen, smelled, felt, or otherwise discovered with the unaided human senses. Mechanical aids to detection are under development, but as of 1960 no such device was available.⁴⁵ This does not mean, however, that biological warfare is irresistible. Man has always been pitted against disease.⁴⁶ He has survived through the development of immunities, medical science, and improved means of sanitation and nutrition. Moreover, no single strain of known biological agents is capable of destroying all life in a community.⁴⁷

Nevertheless, without any intentional help from man, disease has been the most effective producer of casualties during the wars of this century in which the United States participated:

| War | Deaths from— | | Ratio of deaths from disease to deaths from battle injuries & wounds |
|---|----------------|--------------------------|--|
| | Disease | Battle injuries & wounds | |
| Civil War (North)_____ | 199,720 | 138,154 | 1.45 :1 |
| Spanish-American War_---- | 1,939 | 369 | 5.25 :1 |
| Philippine Insurrection_____ | 4,356 | 1,061 | 4.11 :1 |
| World War I Total United States Army. | 56,447 | 50,510 | 1.02 :1 |
| World War II Total United States Army. | 15,779 | 234,874 | .07 :1⁴⁸ |

⁴⁴ See note 1, *supra*; BROPHY, MILES & COCHRANE, *op. cit. supra* note 14, at 102.

⁴⁵ O'Brien, *supra* note 5, at 11.

⁴⁶ Even in modern, antiseptic America, bacteria continue to take lives and there is a constant threat of epidemics. See, e.g., **A & P Orders Tuna Fish Off Shelves**, Daily Progress (Charlottesville, Va.), March 20, 1963, p. 1, col. 4; **U.S. and Switzerland Act to Hold Typhoid Spread & Typhoid Threat Arouses PHS**, Washington Post, March 24, 1963, p. A6, col. 3; **The Plague Fighters**, Newsweek, March 25, 1963, p. 94.

⁴⁷ TM 3-216, paras. 5, 39d.

⁴⁸ IV PREVENTIVE MEDICINE IN WORLD WAR II—COMMUNICABLE DISEASES II (Coates Hoff & Hoff eds., 1958). Although the chart indicates that the U.S. Army was winning its war against fatal diseases, it is stated on page 12 of the cited volume: “as a cause of disabilities in World War II, disease ranked first among the three major categories of military casualties . . . ; in fact, the number of admissions for disease was more than five times as great as the number of admissions for battle casualties and nonbattle injuries.” This is effectively illustrated by the following chart from page 14:

Number and Percentages of Man-Days Lost, By Classification
of Casualties, U.S. Army 1942-1945

| Classification of casualties | Number of man-days lost | Percent of total |
|------------------------------|-------------------------|------------------|
| Disease _____ | 285,918,000 | 68.5 |
| Battle Casualties _____ | 72,000,000 | 17.2 |
| Nonbattle Injuries _____ | 59,863,000 | 14.3 |
| Total _____ | 417,781,000 | 100.0 |

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C. QUALIFYING CHARACTERISTICS

1. *Medical Characteristics.*

The ability to cause disease in man or beast is not the only desirable characteristic of a biological weapon. An effective agent should :

- (a) be lethal or incapacitating in small amounts,
- (b) be difficult to identify,
- (c) remain potent when stored or dispersed, and
- (d) produce diseases which are:
 - (1) difficult to identify,
 - (2) not preventable by common practices of sanitation and immunization, and
 - (3) not curable by customary drugs or antibiotics.

If an agent with all of the above characteristics is not available, the simultaneous use of two or more agents with various characteristics could confuse diagnosis.⁴⁹

2. *Military Characteristics.*

A supply of weapons with the foregoing medical characteristics is of significant military utility. It is an arsenal of weapons with the following military characteristics :

a. *Difficult To Detect.* Biological agents produce no immediate physiological reaction, nor can they be detected by physical senses.

b. *Large Area Coverage.* Casualties can be produced with small amounts of biological agent. This characteristic gives biological agents the capability of covering large areas with small munition expenditure.

c. *Flexibility.* The availability of biological agents that can produce death or varying degrees of incapacitation among target personnel permits the commander to select an agent that will produce the desired military effect.

d. *Delayed Casualty Effect.* The incubation period of biological agents results in a lag period of several days before casualties are produced.

This time interval can be coordinated with planned future operations.⁵⁰

Another military characteristic of consequence is that biological agents do not destroy physical property. Factories, military installations, other structures, and munitions of war may be temporarily unusable due to contamination by infectious biological agents. Decontamination in such cases, however, is much easier and cheaper than the rebuilding required after a fire fight with explosives.

⁴⁹ See *Pugwash International Conference of Scientists — Statement on Biological and Chemical Warfare*, 184 *NATURE* 1018 (1959).

⁵⁰ FM 3-5, para. 116; TM 3-216, at 2.

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D. CLASSIFICATION

Biological agents of value as military weapons⁵¹ are available in three basic classes. The classes are based on the objects of attack of the agents. Thus there are: (1) antipersonnel agents, (2) antianimal agents, and (3) anticrop agents.⁵²

Crossing the bounds of the three basic classes are eight subclasses. With one exception, the subclasses are based on the scientific classification of the agents. Thus there are: (1) fungi, (2) protozoa, (3) bacteria, (4) rickettsia, (5) viruses, (6) toxic products of the foregoing, (7) chemical anticrop compounds, and (8) "pests," which have no common scientific characteristics.⁶³

Fungi generally attack plants, but some do attack man. San Joaquin fever, for example, is a fungus infection of man.⁵⁴

The protozoa are difficult to grow and transmit. Their use, therefore, is limited. If used, they could produce malaria and amebic dysentery.⁵⁵

Harmful bacteria exist in both the antipersonnel and anti-animal classes. In the former are agents which produce tularemia or rabbit fever, plague, bacillary dysentery, and cholera. Anti-animal agents are the anthrax, brucellosis, and glanders producing bacteria.⁵⁶

Rickettsia of military utility produce typhus, Rocky Mountain spotted fever, and Q fever. With one exception, they are vector borne. That is, they are parasites of arthropods such as ticks, lice, fleas, and mites, the so-called vectors of disease, and are transmitted to man and animals by bites from the vectors. The one exception is Q fever, which is acquired by ingesting or inhaling contaminated material.⁵⁷

⁵¹ Most micro-organisms are not harmful, and some are even beneficial to animal and plant life. The relatively few that produce disease are called pathogens. "Of approximately 2,000 identified series [of bacterial, only about 100 are known to be pathogenic." Pathogens generally are parasites; *i.e.*, they are dependent on a living host for food and shelter. Non-parasitic pathogens are those micro-organisms which multiply in dead matter and produce toxins. The tetanus and botulism bacteria are in the latter category. TM 3-216, paras. 8c, 14a.

⁵² H.R. REP. No. 815, 86th Cong., 1st Sess. 7 (1959). As noted previously, however (page 10 *supra*) the ultimate victim is man.

⁵³ *Ibid.*

⁵⁴ *Ibid.*

⁵⁵ *Ibid.*

⁵⁶ *Ibid.*

⁵⁷ *Ibid.*; TM 3-216, para. 15. For a discussion of the diseases resulting from rickettsia and the manner in which they are transmitted to man and animals, see TM 3-216, at 22.

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The viruses are heavy in the antianimal class. The most common virus produced disease in man is influenza. Another is psittacosis or parrot fever which is found in man and animals. Venezuelan equine encephalitis, East African swine fever, hog cholera, Rift Valley fever, rinderpest, foot-and-mouth disease, fowl plague, and Newcastle disease are diseases which can be caused in animals by viruses.⁵⁸

The toxins are poisonous products that micro-organisms may form. The toxins produced by the tetanus and diphtheria organisms are among the most poisonous substances known. The botulism A toxin in pure form, for example, is considered to be by far the most potent poison known.⁵⁹ Because poisons are the subject of a specific prohibition in the law of war, as will be discussed later, the toxins will be discussed in more detail below.

The chemical anticrop agents can be used to regulate the growth of plants or to defoliate them.⁶⁰

"Pests" are also considered possible biological warfare agents. They may be insects or animals that interfere with animal or plant life. They do not have to be disease producing, but can be effective by annoying or worrying. Crawling or buzzing insects are examples of the latter.⁶¹

E. THE TOXINS

Biological warfare can be waged with both toxic and non-toxic agents.⁶² The toxic agents available include the most poisonous substances known.⁶³ As poisons may not be used in war,⁶⁴ it is pertinent to inquire into the characteristics of these toxin producing agents and their effects.

1. Production and Classification.

Some bacteria definitely produce toxins. It is presumed that some rickettsia and viruses also produce them. The products are classified as either exotoxins or endotoxins.

The exotoxins are the more poisonous of the two toxins, but the micro-organisms that produce them have little or no power of

⁵⁸ H.R. REP. NO. 815, 86th Cong., 1st Sess. 7 (1959).

⁵⁹ TM 3-216, paras. 23, 36, 47; 26 ENCYC. AMERICANA, *Toxicology and Toxins*, 729-736 (1962); The *Ultimate Weapon?*, Newsweek, March 4, 1963, p. 56.

⁶⁰ H.R. REP. NO. 815, 86th Cong., 1st Sess. 7 (1959). Note the discussion of the use of such agents at page 5 *supra*.

⁶¹ TM 3-216, paras. 29, 30.

⁶² FM 3-5, para. 5.

⁶³ See note 59, *supra*.

⁶⁴ See page 25 *infra*.

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invasion. The exotoxins are easily destroyed by heat and proteolytic enzymes, but once inside a body they are absorbed into tissues and cause serious or fatal illness. The deadly botulism exotoxin is not so easily destroyed as the other exotoxins. Moreover, it is the only exotoxin that is effective when ingested. Finally, it should be noted that some micro-organisms produce more than one kind of exotoxin.

The endotoxins are rather weak poisons. They are liberated in a body on the dissolution and disintegration of the parent microbial cells which have greater powers of invasiveness than their exotoxin producing counterparts.

2. *Toxin Produced Diseases.*

It is known that exotoxins cause botulism, diphtheria, gas gangrene, tetanus, and bacillary dysentery. Plague, cholera, typhoid, paratyphoid, and epidemic meningitis are typical of endotoxin producing bacilli. These diseases are among those resulting from the agents currently in biological warfare arsenals.⁶⁵

F. EFFECTIVENESS

Biological warfare can be controlled. Control is exercised by determining the effectiveness of a pathogen before it is used. There are always two unknown factors, however, in determining the effectiveness of a biological attack. These unknown factors, *i.e.*, the susceptibility of the attacked individuals to infection and their protection against "invasion," are discussed below following the general topic of the effectiveness of pathogens.

1. *Pathogens.*

The ability of a pathogen to cause an infection, *i.e.*, its effectiveness, can be measured in advance. Among the so-called factors of infection of a pathogen are:

Virulence. Virulence refers to the relative infectiousness of an organism or its ability to overcome the defenses of the host. Pathogens range in virulence from those producing mild and temporary disturbances to those causing incapacitation or death. Virulence of certain organisms can be increased by repeated passage from animal to animal. In general, virulence is dependent on two factors — invasiveness and toxicity.

(a) *Invasiveness.* Invasiveness is the ability of a micro-organism to enter the body and spread through the tissues. It is the predominant factor in the virulence of some micro-organisms, such as those causing tularemia and blood poisoning.

⁶⁵ See TM 3-216, paras. 20, 23.

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(b) *Toxicity*. Toxicity is the quality of being poisonous. The toxicity of micro-organisms depends on the potency of the toxins they produce. In some microbes invasiveness is of less importance than toxicity, as in the case of the organism causing tetanus.⁶⁶

2. *Infection*.

The basis of fatal and non-fatal diseases is infection. Infection occurs when a pathogen invades a body and multiples or produces toxins. The effectiveness of an infection cannot be determined in advance. The portals through which the pathogen enters the body, the virulence and number of pathogens involved, and the defensive powers (immunity, presence of antibodies, general health, etc.) of the invaded body will affect the results of the infection.⁶⁷

3. *Penetration*.

A pathogen must penetrate its target if it is to be effective. This is not difficult. The human body has many natural avenues of infection. For example, micro-organisms enter bodies through the eyes, nose, throat, hair follicles, and sweat gland ducts. Abrasions of the skin are another common portal of entry for some. "Tetanus spores, for example, may be swallowed with impunity by man; but if they are introduced into a lacerated wound, tetanus may develop."⁶⁸

IV. THE LEGALITY OF BIOLOGICAL WARFARE

A. *WEAPONS GENERALLY*

Any weapon can be used illegally. No one would deny the infantryman his rifle. Yet if he uses that weapon to shoot helpless prisoners of war or fire dum-dum bullets he is violating the laws of war.⁶⁹ Similarly, the coating of bayonets or bullets with substances to inflame wounds unnecessarily has been condemned.⁷⁰

⁶⁶ TM 3-216, para. 13.

⁶⁷ *Zbid.*

⁶⁸ *Ibid.*

⁶⁹ See FM 27-10, para. 34. A modern weapon which involves the same problem as the dum dum bullet is the shotgun. Thus, The Judge Advocate General of the Army expressed the opinion in 1961 that:

"... the legality of the use of shotguns depends upon the nature of the shot employed and its effect on a soft target. The use of an unjacketed lead bullet is now considered a violation of the laws of war. The use of shotgun projectiles sufficiently jacketed to prevent expansion or flattening upon penetration of a human body and shot cartridges with chilled shot regular in shape would not constitute violations of the laws of war." JAGW 1960/1305, 4 Jan 1961.

⁷⁰ See FM 27-10, para. 34.

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Artillery has long been a standard military weapon. But it is illegal to use artillery indiscriminately. Thus the bombardment of an undefended hamlet whose only military utility is **an** ethereal morale factor for two of her sons serving among millions in the national Army violates Article **25** of the Hague Regulations.⁷¹ Obviously, therefore, in considering the use of any weapon, new or old, two questions must be answered. First, can this weapon legally be used? Second, if the first question is answered in the affirmative, is the proposed use of this weapon legal?

The answers to these questions depend on entirely different criteria. On the surface, the first question is the easier to answer. It is lawful to use any weapon that is not specifically prohibited by treaty or custom.⁷² But how does one answer the second question? It is submitted that the answer here involves measuring the proposed use against the yardstick of "military necessity." According to the Army manual, military necessity permits or "justifies those measures not forbidden by international law which are indispensable for securing the complete submission of the enemy as soon as possible."⁷³ It has been suggested that a more appropriate description or definition would require that the means be proportional to the end, and that the decision to use a specific means be subject to judicial review.⁷⁴ Nevertheless, it is believed that the determination of what is justified by military necessity must, to a large extent, be left to the discretion of the reasonable commander. What is necessary to subdue the enemy under a given set of facts means one thing to one commander and something else to another. These decisions are normally made in the heat of battle. Therefore, a court would rarely say that a commander's

⁷¹ See FM 27-10, para. 39.

⁷² 2 OPPENHEIM, INTERNATIONAL LAW 340 (7th ed., Lauterpacht ed. 1952). *But see* THE USAGES OF WAR ON LAND [WAR BOOK OF THE GERMAN GENERAL STAFF] (translated by J. H. Morgan) 85-86 (1915), where it is stated:

"In the matter of making an end of the enemy's forces by violence it is an incontestable and selfevident rule that the right of killing and annihilation in regard to the hostile combatants is inherent in the war power and its organs, that all means which modern inventions afford, including the fullest, most dangerous, and most massive means of destruction may be utilized; these last, just because they attain the object of war as quickly as possible, are on that account to be regarded as indispensable and, when closely considered, the most human."

Compare this quote to Articles 22 and 23 of the Hague Regulations, *infra*.

⁷³ FM 27-10, para. 3.

⁷⁴ See O'Brien, *The Meaning of "Military Necessity" in International Law*, 1 WORLD POLITY 109 (1967).

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tactical decision was wrong.⁷⁵ The "estimate of the situation" by one commander would justify the bombardment of a military target with a heavy civilian population. The same facts presented to another commander might result in a different conclusion.

It can be seen from the foregoing that it will not be possible to lay down in advance any more definite rules for determining the legitimate uses of a lawful weapon than the rule of military necessity. For that reason the problem of what could be the legal uses of biological warfare will not be considered here. Thus a determination that biological agents may lawfully be used in war by the United States relegates to the principle of military necessity such emotion-ridden, sometimes hysterical, statements as "but they kill women and children!"⁷⁶ A commander might accept such an argument for not using a particular weapon against a particular target. The argument, however, could never be used to determine whether a particular weapon is legal, as all weapons are capable of killing women and children as well as soldiers. If that were the test, the nations' arsenals would be empty.

B. BIOLOGICAL WARFARE

Until the current *Field Manual 27-10* of the United States was published, official Army doctrine was that biological warfare was

⁷⁵ One of the Nuremberg Military Tribunals, after finding that destruction wreaked by the Germans "was as complete as an efficient army could do it," stated:

"There is evidence in the record that there was no military necessity for this destruction and devastation. An examination of the facts in retrospect can well sustain this conclusion. But we are obliged to judge the situation as it appeared to the defendant at the time. If the facts were such as would justify the action by the exercise of judgment, after giving consideration to all the factors and existing possibilities, even though the conclusion reached may have been faulty, it cannot be said to be criminal. After giving careful consideration to all the evidence on the subject, we are convinced that the defendant cannot be held criminally responsible although when viewed in retrospect, the danger did not actually exist." United States v. List, XI Trials of War Criminals 1296 (1950).

A similar view was taken by another tribunal when it stated:

"The Tribunal does not feel that the proof establishes that the measures applied were not warranted by military necessity under the conditions of war in the area under the command of the defendant." United States v. von Leeb, XI Trials of War Criminals 628 (1950).

⁷⁶ In this connection, see SCHWARZENBERGER, *op. cit. supra* note 6, at 48, where it is stated:

"The principle of the exemption of the civilian population from being an intentional object of warfare as an abstraction from relevant rules of international law has been so whittled down during the Second World War and in post-1945 treaties of a humanitarian character as to cease to offer any reliable guidance."

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illegal. The manuals of 1914⁷⁷ and 1940⁷⁸ provided: “This prohibition [of Article 23a of the Hague Regulations against poison and poisoned weapons] extends to the use of means calculated to spread contagious diseases.” This was not unlike the much criticized *War Book* of the German General Staff which recognized the “propagation of infectious diseases” as one of the few means of warfare prohibited by the usages of war.⁷⁹

One but can wonder as to the reason for the substitution of the equivocal statement on the status of biological warfare in the current *Field Manual 27-10* for the statement in the preceding editions that biological warfare was illegal.⁸⁰ The historical record of the new manual attempts to explain the deletion.⁸¹ Thus it is stated in the history that the provisions on biological warfare in the previous manuals coincided with two English texts⁸² which served as official British manuals regarding the conduct of hostilities until the British *Manual of Military Law* was published in 1929. Then it provides that “the fact that the United Kingdom is also party to the Geneva Protocol of 1925 may help to explain this statement in what was actually the first government manual.” Next it refers to the failure of the Brussels Conference of 1874

⁷⁷ U.S. DEP'T OF ARMY, RULES OF LAND WARFARE, para. 177 (April 25, 1914, as corrected to April 15, 1917).

⁷⁸ U.S. DEP'T OF ARMY, FIELD MANUAL 27-10, RULES OF LAND WARFARE, para. 28 (Oct. 1, 1940).

⁷⁹ THE WAR BOOK OF THE GERMAN GENERAL STAFF, *op. cit. supra* note 72, at 86.

⁸⁰ FM 27-10, para. 38, provides:

“The United States is not a party to any treaty, now in force, that prohibits or restricts the use in warfare of toxic or nontoxic gases, of smoke or incendiary materials, or of bacteriological warfare. A treaty signed at Washington, 6 February 1922, on behalf of the United States, the British Empire, France, Italy, and Japan (*3 Malloy Treaties 3116*) contains a provision (art. V) prohibiting ‘The use in war of asphyxiating, poisonous or other gases, and all analogous liquids, materials, or devices,’ but that treaty was expressly conditioned to become effective only upon ratification by all of the signatory powers, and, not having been ratified by all of the signatories, has never become effective. The Geneva Protocol ‘for the prohibition of the use in war of asphyxiating, poisonous, or other gases, and of bacteriological methods of warfare,’ signed on 17 June 1925, on behalf of the United States and many other powers (*94 League of Nations Treaty Series 65*), has been ratified or adhered to by and is now effective between a considerable number of States. However, the United States Senate has refrained from giving its advice and consent to the ratification of the Protocol by the United States, and it is accordingly not binding on this country.”

⁸¹ A copy of the mimeographed history was made available by the Civil Affairs and International Law Division of The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia.

⁸² HOLLAND, THE LAWS OF WAR ON LAND (1908); EDMONDS & OPPENHEIM, LAND WARFARE! (1912).

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to adopt a prohibition against "contagious disease"⁸³ and to the conviction of the Japanese nationals for using biological weapons in 1939-1942.⁸⁴ The explanation of the deletion of a reference to the illegality of biological warfare is concluded by stating that since the Senate has refused to give its advice and consent to the Geneva Gas Protocol, "it must be accepted that the United States has reserved its position on that point."

The historical record also contains another interesting account. On 1 March 1954 when that record was prepared, the draft of paragraph 38 of *Field Manual 27-10* contained the following: "Gas warfare and bacteriological warfare are employed by the United States against enemy personnel only in retaliation for their use by the enemy." This statement, which does not appear in the current manual, was explained as echoing the 1943 view of President Roosevelt that gas would not be used by the United States except in retaliation,⁸⁵ and as merely stating policy and expectation that could be changed at any time. It was acknowledged that this was an equivocation made necessary by the dilemma between the belief that gas warfare was prohibited by customary international law and the fact that "the United States has refused to become a party to any treaty expressly declaratory of its illegality."

The foregoing explanations from the historical record leave something to be desired in the way of logical consistency. The 1914 Army manual and the two British texts antedate the Geneva Gas Protocol. They provided that biological warfare was prohibited by Article 23a of the Hague Regulations as a poisonous weapon. Since this prohibition was carried forward in the *Field Manual 27-10* of 1940 and the British Manual of 1929, the signing of the Geneva Gas Protocol in 1925 seems of no consequence.

⁸³ It was proposed at the Brussels Conference of 1874 to prohibit the use of "substances of a nature to develop contagious diseases in the occupied country." The proposal was considered unnecessary and not adopted because it was believed that commanders had a great interest in protecting their own troops from contagious disease and would not, therefore, intentionally start an epidemic. SPAIGHT, *WAR RIGHTS ON LAND* 85-86 (1911).

Available references indicate that the complete records of the Brussels Conference of 1874 are contained in so-called Blue Books which were submitted to the British Parliament in 1874-1875. A detailed summary of these "Blue Books," as contained in the report of one of the British delegates, is quoted in 2 LORIMER, *INSTITUTES OF THE LAW OF NATIONS* 337-402 (1884). This report does not refer to the proposed prohibition against biological warfare. The absence of such a reference is some indication of the lack of significance attached to the proposal both at the conference and by publicists of the late 1800's.

⁸⁴ See note 18, *supra*.

⁸⁵ See 1 DEP'T OF STATE BULL. 507 (1943).

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Likewise, the significance of the failure to adopt a prohibition against biological warfare at the Brussels Conference of 1874 is not apparent in a discussion of why, in 1954, biological warfare was no longer considered contrary to Article 23a of the Hague Regulations of 1907. Finally, the historical record, as is the case with most treatments of biological warfare, confuses biological warfare and chemical warfare.

It is believed that the best clue to the reason for the change in treatment of biological weapons between the current *Field Manual 27-10* and its previous editions lies in the very absence from the current manual of both the provision that biological warfare is prohibited by Article 23a of the Hague Regulations and the provision that the United States would use biological warfare in retaliation only. The absence of these provisions indicates that the position of the Army in 1914, 1940, and as late as 1954 on the subject of biological warfare was wrong. It is an indication of a realization that biological warfare is not illegal. Possibly further discussion of the relevant law will sustain the Army's change of opinion more than the historical record did.

C. INTERNATIONAL LAW CONCERNING BIOLOGICAL WARFARE

Where and how is the legality of a weapon found? The answer requires a search for the "international law" on the subject, and the search is not easy. "There are many things upon which international law is silent for the simple reason that it refuses to contemplate their possibility."⁸⁶ Nevertheless, there is a map for the journey. Article 38 of the Statute of the International Court of Justice⁸⁷ prescribes the sources of international law for that court as follows: international conventions,⁸⁸ international custom, and general principles of law recognized by civilized nations. As a subsidiary means of discovering these sources, the same Article lists judicial decisions and the "teachings" of highly qualified international lawyers or "publicists" in various nations.⁸⁹ Article

⁸⁶ THE WAR BOOK OF THE GERMAN GENERAL STAFF, *op. cit. supra* note 72, at p. 7 of translator's introductory chapter.

⁸⁷ 59 Stat. 1031 at 1060, T.S. 993.

⁸⁸ The court is limited in specific cases to international conventions "establishing rules expressly recognized by the contesting states." This restriction has no bearing on a search for rules applicable to the use of biological agents as weapons of war, because it is the search for the legality of a weapons system under circumstances where there are no "contesting states." Any convention bearing on the problem, regardless of the adherents, should be considered.

⁸⁹ But see FM 27-10, para. 4 (providing: "the law of war is derived from two principal sources"—lawmaking treaties and custom).

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38 will be the blueprint for determining whether there are any rules of international law which would affect the United States' use of biological weapons in war.

The search for applicable international law concerning biological warfare is confronted at the outset with a formidable obstacle. The obstacle has already been identified above. It is the inexcusable confusion of biological warfare with chemical warfare.⁹⁰ The essential distinction between the two means of warfare will be preserved here. For that reason, some familiar conventions dealing with gas or chemical warfare will not be discussed with the international agreements concerning biological warfare. Insofar as they may relate to a customary rule, or lack thereof, those conventions will be discussed below.

1. *International Conventions.*

The St. Petersburg Declaration of 1868. The St. Petersburg Declaration of 1868 provides in part :

That the only legitimate object that States should endeavor to accomplish during war is to weaken the military force of the enemy;

That for this purpose it is sufficient to disable the greatest possible number of men ;

That this object would be exceeded by the employment of arms which uselessly aggravate the sufferings of disabled men, or render their death inevitable;

That the employment of such arms would, therefore, be contrary to the laws of humanity.⁹¹

The United States is not a signatory to this declaration. It is noted, however, that the last quoted clause provides that the employment of arms which uselessly aggravate the sufferings of disabled men or render their death inevitable is *contrary to the laws of humanity*. Thus this prohibition might be considered binding as a general principle or as a customary rule of international law on all nations, non-signatories as well as signatories. It will be assumed, therefore, that this prohibition is binding on the United States.

It has been stated that generality is one of the most important characteristics of law. It "makes possible (though it does not guarantee) equality and impartiality in administration, the fulfillment of expectations, and control of the future."⁹² The St.

⁹⁰ Kelly is a notable exception with his detailed treatment of gas warfare without regard to other forms of warfare. Compare Kelly, *supra* note 36, with O'Brien, *supra* note 5.

⁹¹ 3 PHILLIMORE, INTERNATIONAL LAW 161 (3d ed. 1885); U.S. DEP'T OF ARMY, PAMPHLET 27-161-2, INTERNATIONAL LAW, VOL. 11, Appendix B (1962).

⁹² PATTERSON, JURISPRUDENCE-MEN AND IDEAS OF THE LAW 23 (1953).

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Petersburg Declaration of 1868 is a generality. It seeks to prohibit weapons which uselessly aggravate suffering or make death inevitable. This is certainly a desired objective. However, as a norm, it is form without substance. Each weapon must still be measured not against this norm, but against actual state practice.⁹³

A group of men sitting in the calmness and comfort of a conference in 1868 could not decide with definiteness what weapons, in the unimagined arsenals of the future, should be allowed in war. As a substitute, they came up with an indefinite formula.⁹⁴

It is believed that no commander in the heat of battle would refrain from using a weapon available to him because he was advised that it was prohibited because it caused “unnecessary suffering or made death inevitable.” If prohibitions against certain weapons are to have real efficacy, they must be couched in terms that leave no subjective judgment to the commanders in the field or to the national policy makers who are expected to give them effect.

It has been observed in connection with the St. Petersburg Declaration that: “Conceivably, some means of warfare fall within this area of prohibitions intrinsically. . . .”⁹⁵ But what are they? No examples are given. Weapons of war are designed to incapacitate, kill, or destroy. A device which does not do one or more of these has no military utility; it has no capacity for disabling “the greatest possible number of men.” With the possible exception of some chemical agents,⁹⁶ weapons remove men from the war effort by physically injuring them in some manner. If it is accepted that a physical injury causes pain and suffering, it is fruitless to try to define which weapons cause superfluous suffering. What is the objective standard to be applied? What is the “acceptable” amount of suffering? Who is the judge?

What has been said above is true, but to a lesser degree, as to the prohibition against weapons which make death inevitable. If even poisons can be effectively neutralized by attacking them in time, it is difficult to see how any weapon could be classified as one which makes death inevitable. Nevertheless, such a classifica-

⁹³ See FM 27-10, para. 34.

⁹⁴ It is regrettable that those conferees did not have the insight of a contemporary jurisprudent who observed that general statements are useful motivations of social action, but, paradoxically, they “have only a slight *guidance* value in working out governmental implementations.” For it must be remembered that “while philosophic saints in the ivory towers construct ideal societies, ‘burly sinners rule the world.’” PATTERSON, *op. cit. supra* note 92, at 557-558.

⁹⁵ O'Brien, *supra* note 5, at 19.

⁹⁶ See Kelly, *supra* note 36, at 16-17.

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tion has been attempted. It has been suggested that if the initial reports that all who were exposed to the effects of the atomic bombs dropped over Hiroshima and Nagasaki would die were true, such weapons would be prohibited as contrary to the general principle against making death inevitable. It was also believed that the same general principle was the inspiration for the Geneva Gas Protocol and its prohibitions against chemical and biological warfare.⁹⁷ But the initial reports of the effects of the two atomic bombs actually used in the war were not true; all the victims did not die. Moreover, a classification of biological weapons as weapons that make death inevitable would be based on fact. It was noted earlier in this article that infection affects different people in different ways. A pathogen which causes a fatal illness in one person may only make another ill and have no effect on a third person. The effect in each case would depend on such factors as the immunity and general health of the victims and the portals of entry of the pathogens.⁹⁸

Because of the demonstrated indefiniteness of the St. Petersburg Declaration of 1868, conclusions that its status "as an independent norm is extremely questionable"⁹⁹ and that it has "little relevance to modern warfare"¹⁰⁰ should prevail and relegate this Declaration to a limbo in history.¹⁰¹

⁹⁷ See SPAIGHT, *AIR POWER AND WAR RIGHTS* 275-276 (3d ed. 1947). He is careful to point out at p. 275, n. 5, however, that the principle does not apply to projectiles which kill or wound fatally. If it did, practically all weapons would be condemned. In his opinion, the only projectiles affected by this principle are those which "leave the individual wounded or otherwise effected with no hope of survival."

⁹⁸ ". . . the idea of 'quick and certain death' can be associated with BW only by the grossly misinformed As a general principle, BW is unlikely ever to kill *all* its target victims, even within the intended biological class, and BW will certainly never act instantaneously, like high explosive or an atomic bomb." ROSEBURY, *PEACE OR PESTILENCE: BIOLOGICAL WARFARE AND HOW TO AVOID IT* 51, 56 (1949).

⁹⁹ O'Brien, *supra* note 5, at 19.

¹⁰⁰ STONE, *op. cit.*, *supra* note 25, at 552.

¹⁰¹ *But see* SPAIGHT, *AIR POWER AND WAR RIGHTS* 275-276 (3d ed. 1947); Flies, *The Legality of Atmospheric Nuclear Tests—A Critical View of International Law in the Cold War*, 15 U. FLA. L. REV. 21 (1961).

Those who desire to keep the Declaration alive should consider statements like the following if they attempt to apply it to biological warfare:

" . . . [T]he legality of hand grenades, flame-throwers, napalm and incendiary bombs in contemporary warfare is a vivid reminder that suffering caused by weapons with sufficiently large destructive potentialities is not 'unnecessary' in the meaning of this rule [of the St. Petersburg Declaration of 1868]. " SCHWARZENBERGER, *op. cit. supra* note 6, at 44.

" . . . A veteran colonel of the Army's Chemical Warfare Corps recently told Newsweek: 'I'm an enthusiast for BW. It may be a lot more humane. I've seen a man die by flame-thrower—it's horrible. I would say all killing is immoral, but some forms are worse than others.' " *The Ultimate Weapon?*, Newsweek, March 4, 1963, p. 56.

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As the St. Petersburg Declaration of 1868 is so vague, so indefinite, so general as to be an ineffective prohibition, it obviously does not make biological warfare illegal. If there is a treaty prohibition against this means of fighting, it must be found in more definite provisions.

The Hague Regulations. Annexed to Hague Convention No. IV of October 18, 1907, Respecting the Laws and Customs of War on Land, are the *Regulations Respecting the Laws and Customs of War on Land*.¹⁰² These so-called Hague Regulations provide pertinently :

Article 22: The right of belligerents to adopt means of injuring the enemy is not unlimited.

Article 23: In addition to the prohibitions provided by special Conventions, it is especially forbidden —

a. To employ poison or poisoned weapons:

.....

e. To employ arms, projectiles, or material calculated to cause unnecessary suffering.

Article 22 of the Hague Regulations is simply a bland statement that the means of warfare are not unlimited.¹⁰³ Article 23e is a restatement of part of the St. Petersburg Declaration of 1868 in that it **seeks** to prohibit the use of weapons “calculated to cause unnecessary suffering.”¹⁰⁴ Neither of these Articles is any more definite than the St. Petersburg Declaration of 1868. For that reason, what has been said in regard to the Declaration applies equally to them. However, this is not true of Article 23a.

Does the proscription against poisons and poisoned weapons in Article 23a of the Hague Regulations affect biological warfare? Writers tend to give this question the once-over-lightly. Generally, there are no definitions of poison in their discussions. Thus one writer sought to limit the meaning of poison in Article 23a as follows : “this provision *should* be interpreted as encompassing only those forms of biological warfare which has been used in war up to 1907.”¹⁰⁵ This statement has two meanings. One is that some biological weapons are poison or they would not be within the prohibition. The other is that no **post-1907** substance which is

¹⁰² 36 Stat. 2295, T.S. 539.

¹⁰³ It has been alleged that this Article was forgotten during World War II. See Kunz, *The Chaotic Status of the Laws of War*, 45 AM. J. INT'L L. 37, 49 (1951).

¹⁰⁴ In discussing this Article in relation to gas, Kelly raises some of the same questions raised above in connection with the St. Petersburg Declaration of 1868. See Kelly, *supra* note 36, at 45.

¹⁰⁵ See O'Brien, *supra* note 5, at 22. Compare Kelly, *supra* note 36, at 44 (“This codification of custom [Art. 23a] reflected the past, not the unknown future”).

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undeniably a poison would be considered within the prohibition.¹⁰⁶ It is hard to believe that the latter meaning was intended. How do post-1907 poisons fall outside the proscription of Article 23a?¹⁰⁷ It is believed that no sound argument can be made that they do. But such an argument has been made:

It is undoubtedly true that the customary law of war prohibits assassination of enemy civil and military leaders by poisoning. Poisoned spears, swords, arrows, daggers or bayonets are still prohibited. But the former has little to do with the principal means of BC warfare and the latter appears to have virtually no relation to modern weaponry, BC or otherwise.¹⁰⁸

If the first two sentences of the foregoing quote are true, the third is hard to support. Moreover, if the first two sentences are true, it would have to follow that many, if not all, means of biological warfare are illegal under the customary and treaty law concerning poison and poisonous weapons. What is the difference between secreting a lethal dose of pre-1907 poison in the drinking glass of an enemy general and infesting the water supply for his entire headquarters with an unfilterable, germicidal-resistant virus that produces an incurable, fatal illness? If it is illegal to make bayonets infectious with germs which produce very slow healing wounds, why is it not also illegal to immunize friendly troops against tetanus and then spray all battlefields with tetanus spores which can enter the wounds of the enemy and delay healing? If it is true that the old methods of waging war with poison and poisoned arms have no relation to the modern methods of biological warfare, it is inescapable that the results of both methods can be identical. If one method is to be condemned, why should the other be allowed?

After this discussion of poison, a definition seems in order.¹⁰⁹ The so-called Oxford English Dictionary defines poison as "any substance which when introduced into or absorbed by a living

¹⁰⁶ See, e.g., O'Brien, *supra* note 5, at 21 (Art. 23a represents a consensus that poison and poisonous weapons "then known" were outlawed). See also *id.* at 17, 23.

¹⁰⁷ Schwarzenberger's discussion of nuclear weapons contains a good treatment of "poison." He concludes that it is possible to argue that the post-1907 nuclear weapons are poisonous within Art. 23a. SCHWARZENBERGER, *op. cit. supra* note 6, at 2638, 48.

¹⁰⁸ O'Brien, *supra* note 5, at 22.

¹⁰⁹ Schwarzenberger deplors the lack of exploration in this field and notes that "definitions [of poisons and poisonous weapons] excel by their absence" in textbooks and military manuals. He believes that, in the final analysis, an international court or war crimes tribunal will treat the question of what constitutes poison under various treaty provisions as a question of fact to be decided on the basis of expert opinion. See SCHWARZENBERGER, *op. cit. supra* note 6, at 25-27. This approach, however, would give little or no weight to state practice.

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organism, destroys life or injures health, irrespective of mechanical means or direct thermal **changes.**"¹¹⁰ A more contemporary dictionary defines the term in similar fashion **as** "a substance (**as a drug**) that in suitable quantities has properties harmful or fatal to an organism when it is brought into contact with or absorbed by the organism."¹¹¹

Are biological agents **poisons**?¹¹² They are substances and, as noted previously, to have military utility they must produce disease or death. This means that they are substances that are "harmful" or that "injure health." Moreover, it is undisputed that the effects—sometimes fatal effects—produced by bacteria in a host "are a consequence of changes in the chemistry of the host produced directly or indirectly by the bacteria."¹¹³ It seems therefore that the two requirements of both of the foregoing definitions are met.

In any discussion of poison in relation to biological warfare, the toxin producing bacteria must not be overlooked. A toxin, by definition, is a "specific poison . . . especially one produced by a **microbe.**"¹¹⁴ Some of the bacterial exotoxins in the pure state "are by far the most potent poisons **known.**"¹¹⁵ Among the bacteria listed as producing toxins or poisons of this class are some which have been identified as useful agents for biological warfare. For example, the tetanus, diphtheria, and botulism toxins were used in the description of the "fantastic toxicity of such substances."¹¹⁶ These bacteria are sometimes referred to **as** "toxigenic bacteria." Although the bacteriological endotoxins are not so potent **as** the exotoxins, they can be fatal, and when experimental animals were killed with endotoxins, no clearly defined cause of death could be found on autopsy."

"he conclusion is inescapable that the biological agents discussed in this article are poisons. Since at least one writer has suggested that "anything" which is poisonous is covered by Article **23a**,¹¹⁸ one might jump to the conclusion that biological

¹¹⁰ A NEW ENGLISH DICTIONARY ON HISTORICAL PRINCIPLES 1057 (Murray et al ed. 1926).

¹¹¹ WEBSTER, THIRD NEW INTERNATIONAL DICTIONARY, UNABRIDGED 1751 (1961).

¹¹² For an indication of a definite scientific relation between bacteria and poison, see ROSEBURY, *op. cit. supra* note 98, at 55.

¹¹³ 26 ENCYC. AMERICANA, *Toxicology and Toxins* 729-736 (1962).

¹¹⁴ 21 A NEW ENGLISH DICTIONARY ON HISTORICAL PRINCIPLES 207-208 (Murray et al ed. 1926).

¹¹⁵ 26 ENCYC. AMERICANA, *Toxicology and Toxins* 729-736 (1962).

¹¹⁶ *Ibid.*

¹¹⁷ *Ibid.*

¹¹⁸ See SINGH, NUCLEAR WEAPONS AND INTERNATIONAL LAW 164 (1969).

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warfare is prohibited by Article 23a of the Hague Regulations as indicated in the 1914 and 1940 Army manuals on land warfare. This jump is made easier in view of the fact that germs are as old or older than men, and therefore, are pre-1907 "poisons." But the contrary view that the Hague Regulations could not regulate means of warfare unknown in 1907 cannot be ignored.¹¹⁹

What then is the basis for Article 23a of the Hague Regulations? Five reasons generally are given. Poison and poisoned weapons were considered prohibited because they are: (1) treacherous,¹²⁰ (2) cruel, (3) dishonorable,¹²¹ and (4) typical of savages and barbarians. The fifth reason is that princes considered themselves helpless against poison, even when surrounded by their own powerful armies. The fourth and fifth reasons are ascribed to Gentili and Grotius respectively.¹²² Whether biological weapons could be justly condemned, and thus prohibited, under one or more of those five reasons could be the subject of a separate article. Fortunately, however, there is evidence that obviates such an inquiry and makes useless any further discussion about whether Article 23a applies to post-1907 poisons. This evidence is akin to the "practice" that one author found to have placed a restrictive interpretation on Article 23a.¹²³ It is the specific practice or "custom" of regarding biological warfare as not being prohibited by any pre-1925 treaty provision or customary prohibition.¹²⁴ Evidence of this practice is the necessity for a specific prohibition against biological warfare in a treaty subsequent to 1907—the Geneva Gas Protocol of 1925.

The Geneva Gas Protocol. The Geneva Gas Protocol¹²⁵ is the only international convention in effect that mentions "bacteriological methods of warfare."¹²⁶ Although the United States has not ratified the convention, it is of significance because of the number of allies of the United States who are adherents. It provides pertinently :

¹¹⁹ See, e.g., Kunz, *supra* note 103, at 38; note 105, *supra*.

¹²⁰ Tiberius rejected the use of poison because "it was the practice of Romans to take vengeance on their enemies by open force, and not by treachery and secret machinations." 3 VATTEL, LAW OF NATIONS, Ch. 8 (1758).

¹²¹ O'Brien, *supra* note 5, at 21.

¹²² See SCHWARZENBERGER, *op. cit. supra* note 6, at 33-34.

¹²³ See Kelly, *supra* note 36, at 44. See also, O'Brien, *supra* note 5, at 55.

¹²⁴ Since the practice or custom is limited to biological warfare, it cannot be used for a loftier function of establishing a general restrictive interpretation of Article 23a.

¹²⁵ See notes 24, 26, *supra*.

¹²⁶ For a discussion of an earlier unsuccessful attempt to include a prohibition against biological warfare in an international agreement, see note 83, *supra*.

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Whereas the use in war of asphyxiating, poisonous or other gases, and of all analogous liquids, materials or devices, has been justly condemned by the general opinion of the civilized world; and

Whereas the prohibition of such use has been declared in Treaties to which the majority of the Powers of the World are Parties; and

To the end that this prohibition shall be universally accepted as a part of International Law; binding alike the conscience and practice of nations;

Declare: That the High Contracting Parties, so far as they are not already Parties to Treaties prohibiting such use, accept this prohibition, *agree to extend this prohibition to the use of bacteriological methods of warfare* and agree to be bound as between themselves according to the terms of this declaration. [Emphasis added.]¹²⁷

The evidence of a lack of prohibition against biological warfare prior to 1925 in either treaty or custom mounts when the foregoing Protocol is considered. If biological warfare was prohibited by the St. Petersburg Declaration of 1868, the Hague Regulations of 1907, or some other treaty, why was it necessary for some thirty or more powers to sign an agreement in 1925 in which they agreed to *extend* the “existing prohibition against gas warfare” to biological warfare and invite other nations to accede to the convention? Possibly this was due to a lack of appreciation of the nature of biological warfare. But the United States’ delegates played an important role at the conference that resulted in the Protocol, and the then current United States Army manual on land warfare regarded biological warfare as prohibited by the proscription in Article 23a of the Hague Regulations against poisons and poisoned weapons.¹²⁸ A logical conclusion, therefore, is that the parties to the Geneva Gas Protocol did not consider biological warfare subject to any existing treaty provision. So, regardless of the merits of the arguments that Article 23a of the Hague Regulations applies only to pre-1907 poisons and weapons and that the Article has been given a restrictive interpretation, there is irrefutable evidence that as of 1925 a substantial number

¹²⁷ The reservations to this convention which are discussed in note 28, *supra*, should not be overlooked.

¹²⁸ There is a slight indication that biological warfare was prohibited by custom before 1907. In 1885 one writer stated: “If this tendency to shorten a war be the final justification of military proceedings, the ground begins to slip from under us against the use of aconitine [a poison obtained from the aconite plant] and of clothes infected with smallpox.” FARRER, *MILITARY MANNERS AND CUSTOMS* 106 (1885). If such a custom existed, it apparently was forgotten by 1926.

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of world powers thought that biological warfare was *not* prohibited by the mentioned Article.¹²⁹

It might be suggested, however, that the Geneva Gas Protocol merely codified customary international law.¹³⁰ This suggestion has to overcome two obstacles in relation to biological warfare. One is the very wording of the Protocol. The Protocol makes a clear cut distinction between chemical warfare and "bacteriological" warfare. There is a reference to the former being "justly condemned by the general opinion of the civilized world," but there is no reference to a similar "custom" against, or condemnation of, biological warfare. Just the opposite is true. The parties agreed "to extend this prohibition [against chemical warfare] to the use of bacteriological methods of warfare." If an existing prohibition has to be *extended* to another weapon, how can it be argued that the weapon concerned had already been subject to the prohibition?

The second obstacle to accepting the suggestion that the Geneva Gas Protocol codified customary law is the existence of the reservations to it. A customary rule of international law is not dependent on treaties or conventions for its binding effect. It regulates the conduct of all nations.¹³¹ Thus if biological warfare were prohibited by custom, the Geneva Gas Protocol did not codify custom; it repealed the custom. According to that Protocol and the reservations to it by some of the most important parties, biological warfare is banned only in wars exclusively among parties to the Protocol, but it is banned only so long as the parties or their allies do not use biological warfare.

The very wording of the Geneva Gas Protocol and the reservations to it establish that as of 1925 there was no universally accepted prohibition against biological warfare. Hence, there was no custom to be codified.

The deMartens Clause. There remains one more treaty provision which must be acknowledged. The so-called deMartens Clause, which is found in the Preamble to Hague Convention IV

¹²⁹ The same reasoning can be used in support of an argument that treaties prohibiting asphyxiating gases and "analogous liquids, materials, or devices," such as Art. 171 of the Versailles Treaty of 1919 (3 TREATIES, CONVENTIONS, INTERNATIONAL ACTS, PROTOCOLS, AND AGREEMENTS BETWEEN THE UNITED STATES OF AMERICA AND OTHER POWERS 1910-1923 (S. Doc. No. 348, 67 Cong., 4th Sess.) 3329 at 3402 (1923)) and Art. II of the Berlin Treaty of Aug. 25, 1921, which incorporates by reference the section of the Versailles Treaty that contains Art. 171 (42 Stat. 1939, TS 658), did not prohibit biological warfare.

¹³⁰ Schwarzenberger made such a suggestion. See note 174, *infra*.

¹³¹ *Sears v. The Scotia*, 80 U.S. (14 Wall.) 170 (1871).

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of October 18, 1907, *supra*, and in other conventions,¹³² is, unfortunately, a platitude requiring the application of customs and fundamental principles to situations not specifically covered by the laws of war. Custom and fundamental or general principles will be the subject of specific comments below. For that reason, the clause, as it appears in the 1907 Convention mentioned above, is quoted without further comment in this article:

It has not, however, been found possible at present to concert Regulations covering all the circumstances which arise in practice:

On the other hand, the High Contracting Parties clearly do not intend that unforeseen cases should, in the absence of a written undertaking, be left to the arbitrary judgment of military commanders.

Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized people, from the laws of humanity, and from the dictates of the public conscience.

2. Custom.

There is no custom in international law which would prohibit the United States from engaging in biological warfare. The evidence that there is no customary rule in international law that prohibits biological warfare is stronger today than it was in 1925. Biological warfare "is a fact of contemporary military life."¹³³ Even parties to the Geneva Gas Protocol are "prepared for the eventuality of bacteriological warfare."¹³⁴ The stockpiles¹³⁶ of biological weapons are mute evidence that their owners either consider that biological warfare is not illegal or consider that the existing prohibition is ineffective.

¹³² See, *e.g.*, Art. 63, Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of August 12, 1949 (T.I.A.S. 3362); Art. 62, Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of August 12, 1949 (T.I.A.S. 3363); Art. 142, Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949 (T.I.A.S. 3364); Art. 158, Geneva Convention Relative to the Protection of Civilian Persons in Time of War of August 12, 1949 (T.I.A.S. 3365).

¹³³ O'Brien, *supra* note 5, at 15.

¹³⁴ SCHWARZENBERGER, *op. cit. supra* note 6, at 50.

¹³⁵ The U.S. has taken official cognizance of the existence of stockpiles of biological weapons. Thus it is suggested that in Stage II of the disarmament proposed by the U.S.:

"... [O]n the basis of studies previously undertaken, countries would proceed to reduce and eventually eliminate chemical and biological weapons of mass destruction. . . . Countries would slash their stockpiles of such weapons by 60 percent" Towards a World Without War; A Summary of United States Disarmament Efforts—Past and Present 24 (U.S. Army Control and Disarmament Agency Publication 10, Gen. Series 6, Released Oct. 1962).

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How can parties to the Geneva Gas Protocol regard biological warfare as lawful? The answer is that, in final analysis, that Protocol, because of the reservations to it, is merely an agreement among the Contracting Powers not to be the first to use biological weapons in a war involving only Contracting Powers.

Of even more pertinence, however, is the practice in regard to weapons included in the codified prohibitions of the Hague Regulations. Faith in the efficacy of these prohibitions is evidenced by the absence of stockpiles of dum-dum bullets, barbed **arrows**,¹³⁶ and projectiles filled with glass. Moreover, this is not a question of mere utility of the weapons. A dum-dum is more efficient than a regular bullet. A victim of the former rarely lives to fight again. If he does, his recovery can be expected to be more prolonged than the victim of a regular bullet because of the nature of the wound inflicted by dum-dums. Then, strictly from a military viewpoint, and without regard to the humanitarian considerations of unnecessary suffering, is not the dum-dum a better weapon than the ordinary bullet? The answer is yes! Nevertheless, they have not been stockpiled to use in retaliation when the enemy uses them. This is evidence of a belief that they will not be used because they are illegal. Compare this to the stockpiles of poison gas in World War II which were justified on the basis of possible retaliation¹³⁷ and the current preparations for biological warfare.

Although biological agents attack masses and therefore are in a different class from dum-dum bullets (which are limited to individual targets), after initial research, biological weapons are easy and cheap to produce. Also, one characteristic of biological agents is their delayed effect. This alone diminishes their utility as a weapon for immediate retaliation.¹³⁸ So, if a nation finds itself the victim of a biological warfare attack, some means of retaliation more immediately effective than biological weapons would be

¹³⁶ **Spears** and bows and arrows are among the weapons in which U.S. Special Forces receive training. Dodson, *Special Forces*, Special Warfare—U.S. Army 55 (1962). For an account of a fight in Viet Nam where the only fatality was due to a "poisoned arrow," see note 23, *supra*.

¹³⁷ Kelly, *supra* note 36, at 35.

¹³⁸ The delayed effect of biological agents has led one medical expert to characterize them as primarily strategic weapons with little practical value. For that reason they might be most effective against animals and crops, least effective against front line troops, and would have some utility against civilian concentrations. Address by LeRoy D. Fothergill, M.D., of Fort Detrick, Maryland, before the Medical Civil Defense Conference of the American Medical Association in San Francisco, California, on June 21, 1958. (A copy of the address was provided by the U.S. Army Chemical Corps School, Fort McClellan, Alabama.)

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called for. Accordingly, if biological warfare is illegal, if biological weapons are cheap and easy to produce, and if biological weapons are not the best retaliatory weapons because of their delayed effect, why are they stockpiled? Under those circumstances, stockpiles of biological weapons would be real absurdities if biological warfare is, in fact, illegal.

Some who argue that biological warfare is banned by custom refer to the fact that the United States did not assert a right to use biological warfare in Korea. The denial of the charge rather than a justification of biological warfare as legal is urged in support of the argument.¹³⁹ But the tactics of the United States are subject to another interpretation. First, however, before any conclusions are drawn from the charges of biological warfare in Korea, that incident should be recognized in its true perspective. It was a massive propaganda campaign of international Communism that backfired.¹⁴⁰ Ultimately, Russia had to cast its fiftieth veto in the Security Council to block a resolution proposed by the United States to condemn “the practice of fabrication and dissemination” of false charges of biological warfare.¹⁴¹

In view of the propaganda nature of the discussions on biological warfare in Korea, neither side's attitude should be regarded as affecting one way or the other a customary rule on biological warfare. However, if any conclusion is to be drawn from the United States' reaction to the charge of biological warfare, it is believed that the only logical one is that the United States did not recognize any effective prohibition, either by treaty or by custom, of biological warfare. The United States regarded the charge as a monstrous, malicious, and false campaign to spread hatred among men.¹⁴² It was acknowledged that “the people of the United States. . . are sickened at the very thought of the use of the weapons of mass destruction,”¹⁴⁴ that the United States shares mankind's desire “to see these hideous [gas and biological] weapons, along with all other weapons adaptable to mass destruction, banned from national armaments,”¹⁴⁵ and that by its ratification of the Charter of the United Nations the United States was committed “to refrain from not only the use of poisonous gas and the use of germ warfare but the use of force of any kind *contrary to*

¹³⁹ See, e.g., note 176, *infra*; O'Brien, *supra* note 5, at 56–57, 61.

¹⁴⁰ See Volumes 26, 27 & 28, DEP'T OF STATE BULL. *passim* (1951, 1952 & 1953).

¹⁴¹ 27 *id.* 160.

¹⁴² See 26 *id.* 649.

¹⁴³ See 28 *id.* 612.

¹⁴⁴ 27 *id.* 34.

¹⁴⁵ 27 *id.* 294.

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the *law of the Charter*.”¹⁴⁶ (Emphasis added.) But it was also acknowledged that the Geneva ~~Gas~~ Protocol, which Russia was using to support its claims that biological warfare was criminal, was an obsolete “paper pledge”¹⁴⁷ or “paper promise.”¹⁴⁸ Those States, such as Russia, which attached reservation to their ratification of the Protocol laid the groundwork for not abiding with its terms. Thus the false charge of biological warfare by Russia “set the stage for using these weapons itself if it should declare that the states resisting aggression in Korea were its enemies.”¹⁴⁹ Accordingly, the position of the United States was :

The United States, however, is unwilling, completely unwilling, to participate in committing a fraud on the world through placing reliance solely upon paper promises which permit the stockpiling of unlimited quantities of germ warfare or other weapons that could be used at the drop of a hat. . . .

Let use eliminate the weapons. That will bring a sense, a real sense of security to the world.

My Government proposes not the exchange of promises against the use of such weapons but the absolute elimination of such weapons. We want to see the world in a situation where these weapons together with all weapons of mass destruction cannot in fact be used at all, for the simple reason that no one has them and that everyone can be sure that no one has them.¹⁵⁰

Also :

But we do not intend, before such measures and safeguards [to eliminate completely the means of mass destruction] have been agreed upon, to invite aggression by informing, or committing ourselves to would-be aggressors and Charter-breakers that we will not use certain weapons to suppress aggression. To do so in exchange for mere paper promises would be to give would-be aggressors their own choice of weapons. **For** certainly there is no assurance that aggressors, which break their Charter obligations not to go to war, will keep their paper promises not to fight with certain weapons, if they have them and need them to achieve their evil designs.¹⁵¹

Finally, and probably most pertinent to this article :

Mr. Chairman, whose good faith is on trial here? We are urging an impartial investigation and an honest method which we know—and say with a sense of responsibility—will expose a lie. Now, why does the Soviet representative introduce the subject of the Geneva Protocol? *It has nothing to do with the truth or the falsity of the charges of germ warfare.* It is, therefore, an evasion of the point at issue here, a pretext for evading our suggestion for an investigation. The question of the ratification of the Geneva Protocol relates to a quite different, although

¹⁴⁶ 27 *id.* 296.

¹⁴⁷ 26 *id.* 912.

¹⁴⁸ 27 *id.* 297.

¹⁴⁹ 27 *id.* 33.

¹⁵⁰ 27 *id.* 34.

¹⁵¹ 27 *id.* 297.

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a very important matter; that is, what is the most practical effective, and honest method of eliminating bacteriological weapons and other weapons of mass destruction from national arsenals,¹⁵² [Emphasis added.]

The foregoing resume of the United States' refutation of the charges that the United Nations' forces in Korea were engaged in biological warfare is not the description of a "criminal." It is the description of the normal reaction of one falsely accused of an act. The United States' reaction was logical and the only practical one to follow. The charge was false, and the best defense to a false charge, without regard to whether it connotes criminal or immoral conduct, or both, is the truth. Thus the United States' position consistently was to prove the falsity of the charge, to demonstrate the ineffectiveness of the Geneva Gas Protocol, and to lobby for an effective prohibition of biological warfare and other means of mass destruction¹⁵³ by completely eliminating such weapons from all arsenals. It was equally clear that until there was an effective prohibition of biological warfare, the United States would not renounce the use of biological weapons. Thus biological warfare was discussed by the United States throughout the debate in the context of disarmament rather than of illegality.

Finally, both the efforts of the United Nations to secure a convention banning biological warfare and the very futility of these efforts must be considered as reflecting world opinion that biological warfare is not banned by custom. **As** early as 1948 Secretary General Trygve Lie called for a ban on biological warfare.¹⁵⁴ He related this to a 1946 resolution by member nations in the General Assembly to eliminate weapons of mass destruction.¹⁵⁵ Also in 1948 the Security Council endorsed a definition of "weapons of mass destruction" that included biological warfare.¹⁵⁶ In 1950 the Secretary General again called for action against biological warfare by proposing a study on controlling it.¹⁵⁷ In 1952 the General Assembly established a Disarmament Commission to prepare a treaty to eliminate weapons of mass destruction. The instructions to this commission were reaffirmed by the General

¹⁵² 28 *id.* 617.

¹⁵³ For an argument that weapons that do not affect property, such as those in biological and chemical arsenals, are not weapons of "mass destruction," see Jarvis, *Take the Mystery Out of CBR*, Army, Oct. 1967, p. 44 at 46.

¹⁴⁵ See *Ban on Germ War by U.N. Is Unlikely*, N.Y. Times, Aug. 9, 1948, p. 3, col. 1.

¹⁵⁵ U.S. Dep't of State Publication No. 2702, *The International Control of Atomic Energy* 132 (1947).

¹⁵⁶ U.N. SECURITY COUNCIL OFF. REC. 2d year (3/c3) (1949).

¹⁵⁷ Lie *Suggests U.N. Begin Study on Controlling of Germ Warfare*, N.Y. Times, Jan. 3, 1950, p. 12, col. 3.

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Assembly in 1953 and 1954. Today there is still no treaty banning biological warfare in effect.

3. *General Principles.*

The term "general principles of law recognized by civilized nations" has no content. Basically, it is intended to close gaps in international law or to supersede rules of international law that have become outmoded.¹⁵⁸ There is a difficulty, however, in the subjectivity of the term; it includes only those general principles the user says it includes. With but little justification, therefore, consideration of general principles in this article will be limited to those of proportionality and reprisals.¹⁵⁹ Such a limitation is based on precedent. One author in examining the legality of chemical warfare discusses only one general principle, that of proportionality.¹⁶⁰ A more recent consideration of both chemical and biological warfare contains an excellent treatment of "fundamental principles" which found that the only two of current validity and consequence are the ones chosen here.¹⁶¹

Neither the principle of proportionality nor that of reprisals prohibits the United States from engaging in biological warfare. The former is a limitation on the use of authorized weapons;¹⁶² the latter permits, under certain circumstances, the use of unauthorized weapons.¹⁶³ Accordingly, one of these general principles will apply to biological warfare, which is either legal or illegal. If it is determined that biological warfare is legal, the principle of proportionality will prohibit its indiscriminate use. Under a contrary finding as to its legality, biological warfare could be employed to compel an enemy to stop his violations of the international law or war.

¹⁵⁸ Kelly, *supra* note 36, at 50-51.

¹⁵⁹ Principles such as the immunity of non-combatants have no place in the sterile quest for the legality of a weapon. An illegal or unauthorized weapon cannot be used against either combatants or non-combatants.

¹⁶⁰ See Kelly, *supra* note 36, at 50-51.

¹⁶¹ See O'Brien, *supra* note 5, at 8, 37-49. His conclusion at 42-43 that injuring neutrals through the use of "BC" would violate a fundamental principle of international law must not be taken out of context. The last sentence of that conclusion is that the "causal relation" between the injury and the use of the weapon would be determinative of the application of the rule. That is, the question would be: Was the use of the biological weapon indispensable and proportionate to a legitimate military end? Note also, at 45, that reprisals are subject, ultimately, to the principle of proportionality. "The reprisal should be proportionate to the illegal act or acts which engendered the right of reprisals."

¹⁶² Kelly, *supra* note 36, at 51; FM 27-10, para. 41.

¹⁶³ FM 27-10, paras. 495, 497.

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D. JUDICIAL DECISIONS AS EVIDENCE OF THE LAW

Only one international tribunal has expressly referred to biological warfare.¹⁶⁴ In 1930 the Greco-German Mixed Arbitral Tribunal stated:

The dispensation from preliminary notification [required by Article 26 of the Hague Regulations prior to the bombardment of a city] would enable aeroplanes and dirigibles to poison the non-combatant population of an enemy town by permitting them to drop, by night and without warning, bombs filled with asphyxiating gas, spreading death or causing incurable diseases.¹⁶⁵

The foregoing statement is *dicta*. That case concerns the death of neutral Greeks in Bucharest when that city was bombed by the Germans with explosives.

Moreover, the meaning of the quoted material is not clear. It raises the following questions: Were the “incurable diseases” mentioned in connection with the lingering effects of gas, or was biological warfare the reference? Would “causing incurable diseases” have been allowed against combatants? Would “causing incurable diseases” have been allowed against non-combatants after a preliminary notification? Could incurable diseases be spread by means other than bombardment? These questions were not answered by the tribunal.

It should be noted also that this opinion was written five years after the Geneva Gas Protocol was signed. Greece, Germany, and Rumania are parties to that Protocol, so its existence may have had some influence, consciously or subconsciously, on the members of the tribunal.

In view of these considerations, the case is of no assistance as a judicial decision in determining the legality of biological warfare. The reference to biological warfare has no greater weight than expression of opinion by a text writer. The latter’s authority is no better than the sources and evidence that he marshals to support his conclusions.¹⁶⁶

E. VIEWS OF PUBLICISTS AS EVIDENCE OF THE LAW

When an attempt is made to determine what influence the opinions of publicists should have on determining the legality of biological warfare, the confusion resulting from combining chemical and biological warfare is apparent. Material available in the English language generally considers the two means of warfare together. This unrealistic combination complicates the develop-

¹⁶⁴ The conviction of the Japanese for engaging in biological warfare was by a Russian tribunal (see note 18, *supra*), not an international tribunal.

¹⁶⁵ *Kiriadolou v. Germany*, [1929–1930] Ann. Dig. 516 (No. 301). See the reference, *supra* at page 4, to the accusation that Germany dropped sweets infected with cholera in Rumania in World War I.

¹⁶⁶ See *The Paquete Habana*, 175 U.S. 677 (1900).

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ment of a consensus, or the lack thereof, on biological warfare alone.¹⁶⁷ Nevertheless, it is believed that Stone,¹⁶⁸ Tucker,¹⁶⁹ McDougal and Feliciano,¹⁷⁰ O'Brien,¹⁷¹ and Moritz¹⁷² consider biological warfare to be controlled by convention only and not by custom. In effect, this limits the effectiveness of a ban on biological warfare to the parties to the Geneva Gas Protocol.

¹⁶⁷ See, e.g., O'Brien, *supra* note 5, at 50–51, where it is stated that Hyde and Kelly reject the contention that “BC” is illegal. This is only half right. Kelly, *supra* note 36, is concerned with gas or chemical warfare only. Hyde does conclude that the U.S. is not prohibited from using chemical warfare, but he assumes without discussion the validity of statements in the then current U.S. manuals that biological warfare is prohibited. See 3 HYDE, INTERNATIONAL LAW, CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES 1818–1822 (2d ed. 1945). Also, HALL, *op. cit.* *supra* note 12, is cited as authority for the statement that “one seems to deny that there can be any legal use of BC.” Hall, however, does *not* discuss the legality of biological warfare.

¹⁶⁸ “The very text of . . . [the Geneva Gas] Protocol, purporting as it does to ‘extend’ the gas warfare prohibition to bacteriological warfare, seems to admit that no such restriction was to be found in customary international law; a fact in any case clear from the comparatively modern development of the science of bacteriology. Nor is there as yet a sufficient line of treaty undertaking to suggest the growth of any such rule. Its scope therefore must be limited to those states who are parties to the Gas Protocol, within the limits of reciprocity and the like there laid down.

“Since, moreover, the United States is not a party to the Geneva Gas Protocol, and it is unlikely that the State will be a neutral in any major war, it is apparent that whether the prohibition of bacteriological warfare operates in such a war will depend upon the willingness of that State to accept voluntarily the self-denying ordinance.” STONE, *op. cit.* *supra* note 25, at 557.

¹⁶⁹ “But whereas there is in the case of gas an impressive practice of states pointing toward the unlawful character of the resort to gas warfare, a similar practice does not yet exist in the case of bacteriological weapons. It does seem reasonably clear, though, that the present tendency with respect to bacteriological warfare is moving in a direction similar to that earlier taken with respect to gas warfare.” TUCKER, THE LAW OF WAR AND NEUTRALITY AT SEA 52–53, n. 16 (1957).

¹⁷⁰ “The deviations from the Hague Regulation rule forbidding the use of poison and poisoned arms relied upon in making this suggestion [that biological warfare is prohibited by customer law] are not . . . wholly free from difficulties and it remains controversial whether a general prescription has emerged that is operative not only as against the forty-odd nations which have ratified the Protocol but also as against those which have not, such as the United States.” MCDUGAL & FELICIANO, LAW AND MINIMUM WORLD PUBLIC ORDER 637 (1961).

¹⁷¹ “But the same argument of [non-use] may not be used with respect to biological warfare, inasmuch as it has never been used. We know that some kind of capability for waging biological warfare exists today but it has never been tried. Certainly it cannot be said that failure to use a means not adequately developed is proof of an intent to have such a means prohibited. Consequently there can be no customary rules against biological warfare based on non-use.”

“While there is no rule of customary international law prohibiting biological warfare, its first use is denied to adherents to the Geneva Protocol.” O'Brien, *supra* note 5, at 55–56, 59.

¹⁷² “The difference of opinion is still more clearly recognized with regard to the prohibition against bacteriological warfare. As bacteriological warfare

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Arrayed against the writers mentioned above are Lauterpacht,¹⁷³ Schwarzenberger,¹⁷⁴ Singh,¹⁷⁵ Greenspan,¹⁷⁶ and Spaight,¹⁷⁷ who

has not been employed so far, and, in contrast to chemical weapons there have been no previous agreements on the prohibition of bacteriological weapons, there is no customary law under which the use of bacteriological weapons can be said to be prohibited for all states. For these reasons, it has to be stated that within NATO there is no conformity with respect to the prohibition of chemical and bacteriological warfare by treaty law. This fact has to be regarded as of eminent importance, especially in view of the fact that the forces of the most potent military power, the United States, are not bound by the Geneva Protocol." Moritz, *The Common Application of the Laws of War Within the NATO Forces*, 13 MIL. L. REV. 1, 21-22 (1961).

¹⁷³ Lauterpacht is generally regarded as being of the opinion that bacteriological warfare is illegal. For example, Singh (see note 175, *infra*) relies heavily on Lauterpacht in his discussion of the illegality of biological warfare. The latter, however, refers to "bacteriological methods of warfare" only once. The reference is to the fact of inclusion of that means of warfare in the Geneva Gas Protocol. His subsequent discussion concerns the "universality in the prohibition of *chemical* warfare" only. (Emphasis supplied.) It is purely conjecture as to what his beliefs on biological warfare were, but from the tenor of his arguments against chemical warfare it is believed that he would also have condemned biological warfare. 2 OPPENHEIM, *op. cit. supra* note 72, at 342-344.

¹⁷⁴ ". . . [T]he prohibitions of chemical and bacteriological warfare contained in the [Geneva Gas] Protocol must be taken to be merely declaratory of International customary law and equally binding on all States." SCHWARZENBERGER, *Op. cit. supra* note 6, at 38.

¹⁷⁵ "As nuclear explosion produces neither living organisms, nor results in the use of fungi, and the like, it appears clear that resort to nuclear weapons would not amount to biological warfare which has been condemned by all nations, although the United States Field Manual is silent on the subject." SINGH, *op. cit. supra* note 118, at 165. This is as close as Singh comes to expressing his own opinion on the legality of biological warfare. There are references throughout the book, however, to the Geneva Gas Protocol and quotes of the opinions of others such as Lauterpacht and Schwarzenberger on chemical and biological warfare. See, for example, pages 7, 8, 20, 154-155, 161, 164, 220, 253.

¹⁷⁶ "Further, the United States, not a party to the Geneva Protocol, 1925, which prohibited both gas and bacteriological warfare, has repeatedly denied as propaganda allegations that its forces in the Korean conflict have engaged in bacteriological warfare. Obviously, quite apart from treaty obligations, bacteriological warfare is regarded as a disgraceful and impermissible weapon, whose proven use would bring down on its user the merited obloquy of mankind.

"Gas and bacteriological warfare may be regarded as particular instances of infringement against the general prohibition of poison or poisoned weapons in war. . . ." GREENSPAN, *op. cit. supra* note 18, at 358-359.

¹⁷⁷ Spaight is another writer whose views on biological warfare have not been stated clearly. After discussing accounts of the use of poisoned and infected sweets and garlic in World War I, he stated that "the persons responsible were guilty of a grave offense against the laws of war." He does not elaborate. Later he intimates that the use of biological weapons might be contrary to the laws of humanity. See SPAIGHT, *op. cit. supra* note 10, at 191-192, 275-276.

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generally believe that biological warfare is outlawed by both conventional and customary rules.

The opinions of the writers generally are not well grounded. With a few exceptions, such as McDougal and Feliciano, the subject of biological warfare as a separate means is not treated in depth.¹⁷⁸

In view of the foregoing lack of consensus among writers, the only conclusion that is logical is that the opinions of publicists or writers of international law will have no persuasive effect on deciding the legality of biological warfare. This conclusion is not weakened by statements such as :

It is fair to say that the majority of international law authorities, statesmen, high military commanders and informed citizens around the world believe that BC warfare is prohibited by international law. Furthermore, it is equally clear that there is a widespread conviction that this ban expresses the "universal conscience of mankind. . . ." ¹⁷⁹

As the law stands now it is apparently the general consensus of authority that *any* first use of BC is prohibited, no matter what its objective proportionality to the situation!¹⁸⁰

The statements and the beliefs to which they refer generally contain a common mistake. They consider biological and chemical warfare subject to the same rules, but they are not subject to the same rules because of their basic differences. It may be assumed that if all concerned had disciplined themselves to consider chemical warfare and biological warfare separately, the picture would not be so hazy. This distinction has been called "legal hairsplitting."¹⁸¹ Appellations notwithstanding, the fact remains that biological warfare and chemical warfare are not subject to the same rules of international law. This distinction is preserved in the one

¹⁷⁸ O'Brien, *supra* note 5, at 49-54, catalogs a number of authorities in other than the English language and some additional English language texts. Unfortunately, however, he refers to the opinions of the cited authorities on "BC warfare." As noted previously, the authorities may not have included biological warfare in their considerations of chemical or gas warfare. For that reason, his appraisal of the authorities must be considered carefully for any study of chemical or biological warfare as separate entities. But note, also, the following from a non-legal treatment of the subject:

"The following attitudes, whatever their degree of acceptance among peoples outside the U.S., constitute widely accepted attitudes among those (not only clergymen) whose moral judgment is respected in the United States in our time:

". . . .

"Towards gas, biological, and incendiary warfare: Justifiable if effects are confined to military targets. Enduring effects on non-combatants are morally indefensible." Wermuth, *The Relevancy of Ethics*, Army, June 1962, p. 24.

¹⁷⁹ O'Brien, *supra* note 5, at 55.

¹⁸⁰ *Id.* 58.

¹⁸¹ *Id.* 56.

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really pertinent convention. Adherents to the Geneva Gas Protocol recognized an existing prohibition against chemical warfare and “agree[d] to extend this prohibition to the use of bacteriological methods of warfare.”

It is submitted that considerations such as those in the preceding pages influenced the decision of the United States Army in 1956 to remove the prohibition against biological warfare from its manual on land warfare. The Geneva Gas Protocol indicated that biological warfare would not contravene Article 23a of the Hague Regulations, and there was no evidence in 1956 that a customary rule against it had arisen since 1925.

V. THE NECESSITY FOR PREPARATION

Related to the question of legality of biological warfare is the question: Should the United States prepare for biological warfare? As was noted in the discussion above of the United States' position concerning the charges of biological warfare in Korea, it is dangerous to overestimate the effectiveness of internationally imposed restraints or means of warfare such as the Geneva Gas Protocol. The value of such restraints is reduced by the history and legality of reprisals.¹⁸²

The principle of reprisals is a two-edged sword. One edge is restraint; the other is justification. The threat 'or possibility of reprisal can effectively prevent belligerents from breaking the rules of war. It is possible that a belligerent who first uses an illegal means will find his enemy better equipped to use the same illegal means and thus be defeated at his own game.¹⁸³ It is this characteristic of reprisals that hones the other side of the sword. One of the best defenses against being the victim of illegal means of warfare is the ability to retaliate in kind. This, so the argument goes, “justifies” States in arming themselves with prohibited weapons of war. Later, if the need arises, reprisal will also “justify” the use of the weapons. As will be discussed below, biological

¹⁸² SCHWARZENBERGER, *op. cit. supra* note 6, at 41, 58-59; O'Brien, *supra* note 5, at 8, 43-49.

¹⁸³ Stone suggests this as one reason for the non-use of biological agents in World War II. STONE, *op. cit. supra* note 25, at 354, 556.

Fear of retaliation in kind also played a part in the German decision not to use gas in World War II. This was brought out in the following testimony during the war crimes trials:

“In military circles there was certainly no one in favor of gas warfare. All sensible Army people turned gas warfare down as being utterly insane since, in view of your superiority in the air, it would not be long before it would bring the most terrible catastrophe upon German cities, which were completely unprotected.” XVI Trial of the Major War Criminals 527 (1946).

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warfare lends itself readily, but not necessarily practically, to the justification argument of reprisals.

There are also other reasons why biological agents are well qualified candidates for incorporation into arsenals without regard to the legality of their use. The agents must be identified and understood if there is to be a defense against them, "[S]erums for diseases yield only to research begun long in advance."¹⁸⁴ This characteristic would not justify manufacturing and storing biological agents after research had yielded the means of preventing or curing the disease concerned. It does, however, relate directly to two other characteristics which argue for manufacturing and storage. Although requiring considerable research, biological weapons are attainable at moderate cost. This makes them available to any nation on earth. They are not in the exclusive class of nuclear weapons.¹⁸⁵ A third characteristic is that the research into, and stockpiling of, biological agents can be clandestine. An old brewery or a drug house could be the cover for a considerable biological effort, carried on not only in the country planning their use, but in a free enterprise country which was the intended victim.¹⁸⁶ Finally, research involving biological agents can seldom be identified as related either to offensive or defensive systems. Research to develop a defensive system is dependent on a known offensive system, and the development of a new offensive agent automatically calls for the development of its antibody or serum to defend against its use by the enemy.¹⁸⁷

The course of the United States, therefore, is clear. It must be prepared to wage and to defend against biological warfare.¹⁸⁸ Military commanders are aware of the potentials available to them in this field. Reference has been made to some of the unclassified manuals issued by the military departments. These manuals, by their factual treatment of types of biological weapons and their methods of employment, indicate that the United States is prepared to wage and to defend against biological warfare.

VI. SUMMARY

Of the three sources of international law considered, only two, international conventions and custom, offered guidance.¹⁸⁹

The general principles of consequence, proportionality and re-

¹⁸⁴ H.R. REP. No. 815, 86th Cong., 1st Sess. 12 (1959).

¹⁸⁵ *Id.* at 14; TM 3-216, para. 6a.

¹⁸⁶ H.R. REP. No. 815, 86th Cong., 1st Sess. 14 (1959).

¹⁸⁷ BROPHY, MILES & COCHRANE, *op. cit. supra* note 14, at 110.

¹⁸⁸ H.R. REP. No. 815, 86th Cong., 1st Sess. 12, 14 (1959).

¹⁸⁹ As noted in note 89, *supra*, FM 27-10, para. 4, provides that the two principal sources of the law of war are lawmaking treaties and custom.

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prisals, have efficacy only after a determination is made as to the legality of biological warfare. If biological warfare is legal, the principle of proportionality will limit its use as it limits the use of all weapons. If biological warfare is considered illegal, the principle of proportionality will limit its use as it limits the use stances.

A weapon which is not prohibited by a treaty provision or by a customary rule of law may be used in war. The only treaty to which the United States is a party that might prohibit biological warfare is the Hague Regulations. Article 23a of those Regulations prohibits the use of poison and poisoned weapons. Biological weapons are poisons and seemingly would be subject to this prohibition. Events since 1907, however, indicate otherwise. The necessity for a number of major powers to agree in 1925 to ban biological warfare in wars between parties to the agreement, the wording of the agreement itself, and the reservations thereto evidenced a belief that as of that time biological warfare was not prohibited. This belief would extend to custom, to specific prohibitions such as Article 23a of the Hague Regulations, and to general prohibitions such as the St. Petersburg Declaration and Articles 22 and 23e of the Hague Regulations. The continued preparations for biological warfare since 1925 by both parties and non-adherents to the Geneva Gas Protocol, the tactics of the United States in 1951-1952 in treating the problem of biological warfare as one of disarmament rather than illegality in answering the charges of biological warfare in Korea, and the inability of the United Nations to secure a treaty absolutely prohibiting biological warfare are evidence of a widespread belief that biological warfare is not effectively banned.

VII. CONCLUSIONS AND RECOMMENDATIONS

The foregoing analysis leads to three conclusions. The first is that the distinction between biological warfare and chemical warfare is a vital one. The second conclusion that may be drawn is that the United States is not prohibited by treaty from engaging in biological warfare, and no nation is subject to customary prohibition of biological warfare. Finally, it may be concluded that the biological warfare policy of the United States will be influenced by the commitments and legal obligations of its allies.

A. DISTINGUISHING BIOLOGICAL WARFARE

As has been shown, biological warfare has unique characteristics which distinguish it from chemical warfare and other re-

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lated systems ; therefore, biological warfare is not subject to the same legal considerations as chemical warfare. Indeed, the United States, its agencies, and officials make serious mistakes in law, fact, and propaganda in treating biological warfare and chemical warfare as homogeneous.¹⁹⁰

The United States should make an immediate, distinct, and permanent division of its doctrines and publications on biological warfare and chemical warfare. It should begin an active publicity campaign about biological warfare. The campaign should not only tell what biological warfare really is and what it can do, but further, indicate what the limitations of biological warfare are. Further, it should emphasize that the United States is not prohibited from engaging in biological warfare and that the use of biological warfare in the future, where needed, is a distinct possibility.¹⁹¹

B. CONSIDERATIONS IN USE OF BIOLOGICAL WARFARE

It has been demonstrated above that there are no customary rules in international law which prohibit the United States or any other nation from engaging in biological warfare, and further, that the United States is not a party to any international agreement which would deny her the use of biological agents in time of war. Nevertheless, the United States' use of biological agents in any war is subject to the policy consideration of the possible effect of such use on the treaty obligations of those among its allies who are parties to the Geneva Gas Protocol. Accordingly, the United States should amend its manuals for the military forces, such as *Field Manual 27-10*, and the *Rules of Naval Warfare* to remove the equivocation on the subject of biological warfare. It would be appropriate for the manuals to provide:

¹⁹⁰ For an excellent example of the propaganda against the United States resulting from its own unnatural mating of biological warfare and chemical warfare, see Tuckman, *supra* note 20. The 1963 Communist propaganda campaign was given sustenance by official U.S. publications. The activity in question was the use of exclusively chemical defoliants in Vietnam; yet FM 3-5 and TM 3-216 treat this as biological warfare "as a matter of convenience." If the United States is lax in its mixing of terms, it is no wonder that its enemies follow suit.

¹⁹¹ There are indications that such a program is in progress. See, for example, the matter-of-fact statement that new missiles being supplied NATO forces by the U.S. have a biological capability in *Germany Spurs French Bid to Reject U.S. Missiles*, Daily Progress (Charlottesville, Va.), April 2, 1963, p. 8, col. 1; *Dugway's Top Secret CBR Course Is One for Top Service Planners*, Army Times, March 20, 1963, p. E4, col. 1.

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The United States is not prohibited by a treaty obligation or by customary international law from engaging in biological warfare. Whether it will be used in war is a policy determination reserved for the national policy level. One reason for this reservation is the alliances between the United States and parties to the Geneva Gas Protocol. That Protocol prohibits parties to it from engaging in “bacteriological” warfare, but reservations to it by such countries as Russia, Great Britain, and France provide that the Protocol is not binding on a reserving Power who is at war with a nation who is not a party to the Protocol and ceases to be binding as to a reserving Power who is the victim of a biological attack by another Power to the Protocol or one of its allies. The United States is *not* a party to this Protocol.

THE STATUS OF BIOLOGICAL WARFARE IN INTERNATIONAL LAW*

BY COLONEL BERNARD J. BRUNGS**

I. HISTORICAL EFFORTS TO PROHIBIT OR LIMIT BACTERIOLOGICAL WARFARE

A. *THE BRUSSELS DECLARATION OF 1874*

Prior to the efforts undertaken by the League of Nations beginning in the early 1920's there were, strictly speaking, no international efforts to prohibit or limit bacteriological warfare in the sense in which it is now understood. However, the subject of "the spreading of contagious diseases" did arise briefly on three occasions during sessions of the Brussels Conference of 1874, at which thirteen of the principal States of Europe had met to reach agreement on the topic of the laws of war.

The working draft declaration taken up by the conference provided that belligerents were to be forbidden "the use of poisoned weapons or the spreading, in any means whatsoever, of disease on enemy territory."¹ One of the delegates suggested simplifying the wording by eliminating the expression "spreading,"² because it was subject to misunderstanding. Whereupon the delegates voted to change that phrase to read simply: "The use of poison and poisoned weapons."³

Later the subject was raised again when a delegate suggested adding to these words a phrase to prohibit the use of "substances of a nature to develop contagious diseases in the country." He said this would be "an additional guarantee for preventing the propagation of diseases of this nature, and would oblige belligerents to take serious precautions to prevent the contagion from spreading." No action was taken on the proposal after another

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¹ACTES DE LA CONFERENCE DE BRUXELLES DE 1874: SUR LE PROJET D'UNE CONVENTION INTERNATIONALE CONCERNANT LA GUERRE 5 (1874) [cited hereafter as ACTES DE BRUXELLES CONFERENCE]. The prohibition was Article 12a of the working draft.

²"Propagation" in the French.

³ACTES DE BRUXELLES CONFERENCE, *op. cit. supra* note 1, at 8.

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delegate expressed the opinion that the matter was rather the business of a Sanitary Convention than of the Brussels Conference.⁴

However, the delegate who made the proposal later tried again after another delegate had suggested changing the article so as to forbid "poisoned weapons or substances." Another agreed, but suggested that the additional phrase read: "or of a nature to develop contagious diseases in the occupied country." Another suggested that no change be made but that the phrase "the use of poison and poisoned weapons" be interpreted to forbid "the employment of all substances which are of a nature to spread in the occupied country any contagion whatsoever." Another delegate then pointed out that "the occupying army has the greatest interest in taking every possible precaution to prevent their own soldiers becoming infected with contagious diseases." The delegate who had offered the amendment stated that he was satisfied with the interpretations, "according to which the occupying army cannot avoid, either intentionally or through negligence, observing customary sanitary regulations." Nothing further was said on this subject.⁵

The final Declaration agreed upon by the delegates stated that among actions "strictly forbidden" was "the use of poison or poisoned weapons."⁶ However, the delegates had not been authorized to bind their governments, and the governments did not ratify the Declaration.⁷

B. THE HAGUE PEACE CONFERENCES OF 1899 AND 1907

When the Russian Foreign Minister proposed the program for the Hague Conference of 1899, he submitted as one of the subjects for discussion the "revision of the declaration concerning the laws and customs of war elaborated in 1874 by the Conference of Brussels, and not yet ratified."⁸

The Brussels text was used as the basis for the 1899 Hague Conference's discussions on the laws of land warfare.⁹ According

⁴ See *id.* at 41; 2 BRUSSELS CONFERENCE ON LAWS AND CUSTOMS OF WAR: PROCEEDINGS 1874, at 284 (1875) [cited hereafter as BRUSSELS CONFERENCE PROCEEDINGS].

⁵ See ACTES DE BRUXELLES CONFERENCE, *op. cit. supra* note 1, at 51; 2 BRUSSELS CONFERENCE PROCEEDINGS, *op. cit. supra* note 4, at 310-311.

⁶ *Id.* at 321. The number was changed to Article 13a in the final Declaration.

⁷ 1 SCOTT, THE HAGUE PEACE CONFERENCES OF 1899 AND 1907, at 123 (1909).

⁸ INSTRUCTIONS TO THE AMERICAN DELEGATES TO THE HAGUE PEACE CONFERENCES AND THEIR OFFICIAL RECORDS 4 (Scott ed. 1916).

⁹ See 1 THE PROCEEDINGS OF THE HAGUE PEACE CONFERENCES: TRANSLATION OF THE OFFICIAL TEXTS 50 (Scott ed. 1921).

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to the minutes¹⁰ of this Conference and that of 1907 which followed, there was no mention whatsoever of bacteriological warfare or contagious diseases; the wording “poison or poisoned weapons” of the Brussels text was adopted each time without discussion.¹¹

C. THE LEAGUE OF NATIONS PRIOR TO 1925

In 1923, the League of Nations' Temporary Mixed Commission for the Reduction of Armaments sought a report on chemical and bacteriological warfare “from the most qualified experts.”¹² On July 30, 1924, a committee of four professors reported their opinion :

Bacteriological warfare would have little effect on the actual issue of a contest in view of the protective methods which are available for circumscribing its effects.¹³

They said that although this was the opinion of the majority of the experts, it did not

...constitute the final word on the subject, for although the conclusion drawn may be comparatively reassuring for the present, they nevertheless direct attention to the possibilities which the development of bacteriological science may offer in the future.¹⁴

D. THE GENEVA PROTOCOL OF 1925

The Hague Convention of 1907 had stated that “. . . it is especially forbidden . . . to employ poison or poisoned weapons.”¹⁵ The 1922 treaty known as the Declaration of Washington,¹⁶ although it made no mention of bacteriological warfare, went be-

¹⁰ See generally 1-5 *id.*

¹¹ See *ibid.* This prohibition became Article 23a in both the 1899 and the 1907 Hague Regulations. 2 SCOTT, *op. cit. supra* note 7, at 127, 389.

¹² League of Nations Document 1923.IX.A.35 (Part 11), at 6-7; League of Nations Document 1924.IX.A.16, at 24-25.

¹³ League of Nations Document 1924.IX.A.16, at 29-30.

¹⁴ *Ibid.*

15 U.S. DEP'T OF ARMY, PAMPHLET NO. 27-1, TREATIES GOVERNING LAND WARFARE 12 (1956).

¹⁶ This treaty was drawn up at the 1921-1922 Washington Conference on Limitation of Naval Armaments, and was signed on February 6, 1922, by the five Powers attending: The United States, the British Empire, Italy, France, and Japan. Its ratification was advised by the U.S. Senate on March 29, 1922, and the treaty was ratified by the President on June 9, 1923. 1 U.S. DEPARTMENT OF STATE, PAPERS RELATING TO THE FOREIGN RELATIONS OF THE UNITED STATES: 1922, at 267-269 (1938). However, the treaty did not come into effect, owing to the fact that whereas the treaty required unanimous ratification to be effective, France—owing to her objection to an article banning submarines as commercial destroyers—did not ratify the treaty.

For text of Declaration, see also 2 INTERNATIONAL LEGISLATION 794 (Hudson *ed.* 1931).

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yond the 1907 Hague Convention by embodying in Article V the following prohibition :

The use in war of asphyxiating, poisonous, or other gases and all analogous liquids, materials or devices, having been justly condemned by the general opinion of the civilized world and a prohibition of such use having been declared in treaties to which a majority of the civilized Powers are parties,

The signatory Powers, to the end that this prohibition shall be universally accepted as part of International Law binding alike upon the conscience and practice of nations, declare their assent to such prohibition, agree to be bound thereby as between themselves, and invite all other civilized nations to adhere thereto.

Although the Declaration of Washington did not come into effect," its prohibition on gas warfare was extended to bacteriological warfare by the Geneva Protocol which was adopted by the Geneva Conference on June 17, 1925:

Whereas the use in war of asphyxiating, poisonous or other gases, and of all analogous liquids, materials or devices, has been justly condemned by the general opinion of the civilized world; and

Whereas the prohibition of such use has been declared in treaties to which the majority of the Powers of the world are parties; and

To the end that this prohibition shall be universally accepted as a part of International Law, binding alike the conscience and the practice of nations;

Declare:

That the High Contracting Parties, so far as they are not already parties to treaties prohibiting such use, accept this prohibition, agree to extend this prohibition to the use of bacteriological methods of warfare, and agree to be bound as between themselves according to the terms of this Declaration.¹⁸

By 1962, the Geneva Protocol had been signed and ratified or adhered to by forty-six States (including the United Kingdom, France, and the Soviet Union).¹⁹

Although the United States and Japan signed the Protocol, neither ratified it. On January 12, 1926, the treaty was sent to the United States Senate for its advice and consent. However,

¹⁷ See note 16, *supra*.

¹⁸ League of Nations Document A.13.1925.IX, Proceedings of the Conference for the Supervision of the International Trade in Arms and Ammunition and in Implements of War (Geneva, May 4th to June 17th, 1925), at 77 [cited hereafter as 1925 GENEVA CONFERENCE PROCEEDINGS]; 3 INTERNATIONAL LEGISLATION 1670 (Hudson ed. 1931).

¹⁹ Information received from the Treaty Section of the United States Department of State (April 11, 1962). See note 73, *infra*.

A number of these States have ratified or adhered to the Protocol with the reservations that it is binding only as regards the Powers which have also signed and ratified it or who have acceded to it and that it ceases to bind any Power whose armed forces or the armed forces of whose allies fail to respect our prohibitions of the Protocol.

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open hearings developed such strong opposition—the discussion centered around chemical warfare, not bacteriological warfare²⁰—that the treaty was sent back to committee, where it remained buried.

In June 1962, during discussions in the United Nations regarding the Communist Chinese and North Korean charges of the use of germ warfare by the United States, the Soviet representatives submitted to the United Nations Security Council a draft resolution calling upon all States who had not yet done so to ratify or accede to the Geneva Protocol.²¹ The United States representative inferred that the Soviet proposal was merely part of the Communists' germ warfare propaganda campaign, and said that the Protocol did not provide the minimum requirements to guarantee the prohibition of bacteriological warfare.²² When the resolution came to a vote in the Security Council it failed of adoption when the other ten members abstained while the Soviet Union cast the lone affirmative vote.²³

On July 16, 1952, Communist China formally notified the United Nations that it had decided to recognize the 1929 accession of China to the Geneva Protocol.²⁴ The timing, if not the action itself, must be considered in light of the value of this announcement in the germ warfare campaign then being waged against the United States.

E. THE LEAGUE OF NATIONS DISARMAMENT PROPOSALS 1926-1936

On December 9, 1930, the Preparatory Commission for a Disarmament Conference, representing twenty-seven States, adopted a Draft Convention for the Reduction and Limitation of Armaments. Article 39 stated:

The High Contracting Parties undertake, subject to reciprocity, to abstain from the use in war of all asphyxiating, poisonous, or similar gases, and of all analogous liquids, substances, or processes. They undertake *unreservedly* to abstain from the use of bacteriological methods of warfare.²⁵ [Emphasis added.]

²⁰ There were only two brief passing references to bacteriological warfare. See 69 CONG. REC. 143, 150 (1926).

²¹ U.N. Doc. No. S/2663.

²² See 6 INTERNATIONAL ORGANIZATION, 576-581 (1952).

²³ U.N. SECURITY COUNCIL OFF. REC. [hereafter cited as UNSC/OR] Seventh Year, 583d Meeting, June 26, 1952, at 2.

²⁴ *United Nations Document S/2707*, UNSC/OR, Seventh Year, Supplement for July, August, and September 1962, at 12-13.

²⁵ MYERS, *WORLD DISARMAMENT: ITS PROBLEMS AND PROSPECTS* 300 (1932).

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Note the distinction between the scope of the renunciation of chemical weapons on the one hand and of bacteriological weapons on the other. Apparently, the abstention from the use of bacteria was not to be subject to reciprocity.

However, the Disarmament Conference itself failed to take final action on the draft convention, nor did it act on a British proposal in 1933 concerned with the prohibition of chemical-biological warfare and preparations therefor.²⁶

In 1932, a committee of the Disarmament Conference stated that "the use of pathogenic microbes for the purpose of injuring an adversary is condemned by the conscience of humanity," and recommended that bacteriological weapons be included in qualitative disarmament.²⁷

The withdrawal of Germany from the Conference and from the League of Nations in the autumn of 1933 forestalled any formal action on the final draft Disarmament Convention, which provided for the banning of bacteriological weapons. However, the 1936 Preliminary Report of the Work of the Conference stated:

The use of chemical, incendiary, or bacterial weapons against any State or in any war whatever its character, is prohibited. All preparations for such warfare are prohibited in time of peace as in time of war. The right of reprisals, however, is recognized, as is the freedom of the contracting parties in respect of materials or installations intended to ensure individual or collective protection.²⁸

This provision appears to be inwardly contradictory in that although it states that peacetime preparations are prohibited, yet it recognizes the right to prepare for the use of reprisals in kind to ensure compliance on the part of others.

F. THE BRUSSELS PROTOCOL ANNEX OF 1951

In an Annex to the Brussels Protocol, West Germany agreed not to manufacture any biological weapons in her territory.²⁹ However, this prohibition did not apply to the other parties to the protocol. Although Article 3 of Protocol III provided for the control of stockpiles of such weapons when manufactured by the other members of the Western European Union, "no instance has been reported of the invoking of the provisions of Article 3."³⁰

²⁶ See STAFF OF SUBCOMM. ON DISARMAMENT, SENATE COMM. ON FOREIGN RELATIONS, 86TH CONG., 2D SESS., ~~CHEMICAL BIOLOGICAL RADIOLOGICAL~~ (CBR) WARFARE AND ITS DISARMAMENT ASPECTS 9 (Comm. Print 1960) [cited hereafter as SENATE CBR DISARMAMENT REPORT].

²⁷ See League of Nations Document 1936.1X.3.Conf. D. 171(1), at 104.

²⁸ *Id.* at 111.

²⁹ The New York Times, October 24, 1954, p. 42, col. 1.

³⁰ SENATE CBR DISARMAMENT REPORT, *op. cit.* supra note 26, at 10.

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G. THE EUROPEAN DEFENSE COMMUNITY

The control of biological weapons was to be given to the commissariat. However, the French failed to ratify the treaty.³¹

H. THE AUSTRIAN PEACE TREATY

The treaty which restored Austria's sovereignty after World War II prohibits her from possessing, constructing, or even experimenting with atomic, chemical, or biological weapons.³² Here again, however, the prohibition is one-sided, and may be considered in this instance to be founded not so much on the consideration of the nature of the weapons as on the objective of neutrality.

I. THE UNITED NATIONS

When U.S. President Harry Truman and British Prime Minister Clement Atlee issued a joint statement in November 1945 urging international control of the entire field of atomic energy, perhaps they had in mind biological warfare when they included the following sentence: "Nor can we ignore the possibility of the development of other weapons, or of new weapons of warfare, which may constitute as great a threat to civilization as the military use of atomic energy."³³

Speaking at the United Nations on December 2, 1946, the United States delegate, Senator Tom Connally, insisted that any scheme for international control of armaments must include such weapons as biological warfare, which were not included in a resolution proposed by the Soviet Union. The British representative stated there "is no longer safe ground for being sure that the atom bomb is the most terrible" of existing weapons. Connally said: "We see no reason why one who is infected by a biological germ has any better prospect of revival and rehabilitation than one who is a victim of the atomic bomb. And we see no reason why these other deadly measures shall not be included in any plan of disarmament."³⁴ The Soviet representative said that gas and bacteriological warfare had already been prohibited by international agreements, but that the Soviet Union would reaffirm these

³¹ *Ibid.*

³² *Ibid.*

³³ Schuyler, *Biological Warfare—The Final Weapon*, 78 AMERICA 569 (1948).

³⁴ U.N. DOC. NO. A/C.1/101: Official Records of the Second Part of the First Session of the General Assembly: First Committee: Political and Security Questions including Regulation of Armaments: Summary Record of Meetings: 2 November - 13 December 1946: Thirty-Fourth Meeting, 2 December 1946, at 222.

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if that were necessary. The U.S. and Britain insisted on strict inspection and regulation of enforcement of any disarmament plan.³⁵

On August 7, 1948, in the Introduction of his *Annual Report to the United Nations*, Secretary General Trygve Lie urged action by the U.N. looking toward preventing or controlling the manufacture of bacteriological weapons. He said: "All members of the United Nations, including the Great Powers, remain bound by their solemn pledge, made at the first session of the General Assembly almost two years ago, to eliminate all weapons of mass destruction."³⁶

On August 12, 1948, the United Nations Commission for Conventional Armaments adopted a resolution³⁷ advising the Security Council that weapons of mass destruction should be defined to include lethal biological weapons.

In a magazine article in 1950, Trygve Lie again called attention to the fact that the U.N. Atomic Energy Commission, which the General Assembly had entrusted in 1946 with the responsibility for working out proposals for the elimination from national armaments not only of atomic weapons but of all other major weapons, had "never discussed these other weapons, such as biological and chemical weapons; some of these weapons may be even more destructive of human life than atomic weapons."³⁸

On January 11, 1952, the United Nations General Assembly voted the establishment of a Disarmament Commission,³⁹ and called for "the elimination of all major weapons of mass destruction."⁴⁰ In the Disarmament Commission, the United States representative offered on March 14, 1952, a draft plan⁴¹ of work for the Disarmament Commission, which envisaged the "elimination of all major weapons adaptable to mass destruction,"⁴² including

³⁵A summary of the discussion will be found in *The New York Times*, December 3, 1946, p. 1, col. 2, p. 4, col. 2.

³⁶U.N. Doc. No. A/565: Annual Report of The Secretary General on the Work of the Organization 1 July 1947 - 30 June 1948, General Assembly Official Records: Third Session, Supplement No. 1, at xiii.

³⁷U.N. Doc. No. S/C. 3/32 United Nations General Assembly Resolution 41(I) of December 14, 1946, had referred to the necessity of prohibiting and eliminating from national armaments atomic and all other major weapons adaptable now and in the future to mass destruction.

³⁸Trygve Lie, UN v. Mass *Destruction*, *Scientific American*, Jan. 1950, pp. 11-13.

³⁹UNGA/OR, Sixth Session, Plenary Meetings, Verbatim Record of Meetings: 6 November to 5 February 1951 - 1952, at 295.

⁴⁰U.N. General Assembly Resolution 502(VI).

⁴¹U.N. Doc. No. DC/3.

⁴²United Nations Disarmament Commission Official Records [cited hereafter as UNDC/OR], 2d Meeting, 14 March 1952, at 7.

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bacterial warfare.⁴³ However, whereas the United States representative **took** the position that “such prohibitions can be effective only when they are accompanied by safeguards — international controls — which will ensure their observance,”⁴⁴ the Soviet representative merely proposed that immediate attention be given to a declaration **of** the unconditional prohibition **of** bacterial warfare.⁴⁵ This divergence of approach toward disarmament was still in evidence ten years later.

However, in June 1952 the question **of** the prohibition of bacteriological warfare became the subject of especially lively and acrimonious debate in the United Nations when Communist China and North Korea launched their germ warfare charges against the United States and were strongly supported by the Soviet Union. The Soviet Union introduced in the Security Council a draft **resolution**⁴⁶ calling upon all States who had not yet done so to ratify or accede to the 1925 Geneva Protocol prohibiting bacteriological warfare. The United States replied that the Protocol, in the absence of control measures, would be ineffective,⁴⁷ and suggested that the draft resolution be referred to the Disarmament Commission where the question of the elimination of bacteriological warfare was already under **discussion**.⁴⁸ There seemed to be general agreement among the Security Council delegations that the Protocol alone would be ineffective in guaranteeing the prohibition of biological warfare;⁴⁹ thus the Soviet draft resolution was defeated, by a vote of one in favor (the Soviet Union) with ten abstentions, thereby failing to obtain the required seven affirmative votes.⁵⁰ Thereupon, the United States withdrew its motion to refer the resolution to the Disarmament Commission — for the reason that the matter was already under discussion there.⁵¹

Disarmament talks during the next eight years were sporadic and fruitless, formal discussions being suspended when the Soviet representatives walked out of a conference at Geneva on June 27, 1960.⁵²

⁴³ *Id.* at 24.

⁴⁴ UNDC/OR, 1st Meeting of Committee 1, 4 April 1952, at 14.

⁴⁵ UNDC/OR, Special Supplement No. 1: **Second** Report. of the Disarmament Commission, at 6.

⁴⁶ U.N. Doc. No. S/2663.

⁴⁷ UNSC/OR, Seventh Year, 577th Meeting, 18 June 1952, at 23.

⁴⁸ *Id.* at 25.

⁴⁹ UNSC/OR, 577th to 583d Meetings, 18–26 June 1952.

⁵⁰ UNSC/OR, 583d Meeting, 26 June 1952, at 2.

⁵¹ *Id.* at 6.

⁵² “he Washington Post, September 21, 1961, p. A17, col. 1.

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On September 20, 1961, the United States and the U.S.S.R. filed at the United Nations a joint statement⁵³ announcing agreement on a broad set of disarmament principles, to include:

...elimination of all stockpiles of nuclear, chemical, bacteriological, and other weapons of mass destruction and cessation of the production of such weapons.

...elimination of all means of delivery of weapons of mass destruction. The disarmament program was to be carried out in an agreed sequence of verified stages.⁵⁴

However, this statement was not an agreement on disarmament itself, but merely an agreement to start talking again about disarmament.

Early in 1962, the Soviet Union submitted a Treaty on General and Complete Disarmament under Strict International Control.⁵⁵ The treaty would oblige the Parties to carry out over a four-year period general and complete disarmament to include "prohibition, destruction of all stockpiles, and cessation of production of all types of mass-destruction weapons, including . . . biological . . . weapons."⁵⁶

On April 18, 1962, the United States submitted a new comprehensive disarmament plan.⁵⁷ The U.S. plan called for the "elimination of all stockpiles of . . . biological . . . and other weapons of mass destruction and cessation of the production of such weapons."⁵⁸

On May 15, 1962, the United States delegate at Geneva stated: "We declare our readiness to participate in an expert study group to examine the possibility of including elimination of chemical and bacteriological weapons in Stage One of general and complete disarmament."⁵⁹ The Soviet delegate made no reply to the American offer.

⁵³ U.N. Doc. No. A/4879 (Letter dated 20 September 1961 from the Permanent Representatives of the USSR and the USA to the UN addressed to the President of the General Assembly).

U.N. Doc. No. A/4880 (Transmitting a U.S. memorandum on composition of the disarmament forum, memorandum on principles that should govern disarmament negotiations for general and complete disarmament, and letter of 20 September 1961 from J. J. McCloy to V. A. Zorin).

⁵⁴ The Washington Post, September 21, 1961, pp. A1, A16, cols. 1, 5.

⁵⁵ For the text of this draft treaty, see 56 Am. J. Int'l L., at 926-946 (1962).

⁵⁶ *Id.* at 926.

⁵⁷ UNITED STATES ARMS CONTROL AND DISARMAMENT AGENCY, BLUEPRINT FOR THE PEACE RACE: OUTLINE OF BASIC PROVISIONS OF A TREATY ON GENERAL AND COMPLETE DISARMAMENT IN A PEACEFUL WORLD. For the text of this draft treaty, see 56 Am. J. Int'l L., at 899-925 (1962).

⁵⁸ *Id.* at 899.

⁵⁹ The New York Times, May 16, 1962, p. 9, col. 2.

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Although disarmament **talks** continued at Geneva, by mid-1962 no visible progress had been made toward effective disarmament in the biological weapons area.

II. PRESENT INTERNATIONAL LAW ON BIOLOGICAL WARFARE

What *binding* rules and principles of international law now exist with reference to biological warfare?

The answer can best be sought by applying the same criteria which Article 38 of the Statute of the International Court of Justice⁶⁰ directs that Court to use in administering international law: international conventions, international custom, the general principles of law, judicial decisions, and the teachings of the most highly qualified international law text writers.

▼

A. INTERNATIONAL CONVENTIONS

1. *The St. Petersburg Declaration of 1868.*

On December 11, 1868, the representatives of seventeen European States adopted a short Declaration which stated:

The only legitimate object which States should set before themselves during war is to weaken the military forces of the enemy; . . . For this reason it is sufficient to disable the greatest possible number of men; . . . this object would be exceeded by the employment of arms which would uselessly aggravate the sufferings of disabled men, or render their death inevitable; . . . the employment of such arms would, therefore, be contrary to the laws of humanity.⁶¹

In short, this Declaration forbade methods of warfare or weapons which could cause unnecessary suffering or which would render death inevitable. The question of "unnecessary suffering" will be discussed later⁶² in connection with the Hague Convention of 1907.

As far as "inevitability of death" is concerned, there are some biological agents which produce illnesses that rarely cause death. Moreover, even in the case of those agents having a high probability of death, it would never be a certainty. "BW could never be absolute in its effects. It could not be expected to infect all the individual intended victims in the target area, much less to kill

⁶⁰ UNITED STATES DEPARTMENT OF STATE, THE UNITED NATIONS CONFERENCE ON INTERNATIONAL ORGANIZATION, SAN FRANCISCO, CALIFORNIA, APRIL 25 to JUNE 26, 1945: SELECTED DOCUMENTS 973 (1946); T.S. 993, 59 Stat. 1031.

⁶¹ HOLLAND, THE LAWS OF WAR ON LAND (WRITTEN AND UNWRITTEN) 41 (1908).

⁶² *Infra*, pp. 59-61.

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them.”⁶³ In addition, measures of a medical nature will eliminate “certainty of death.” “If we have made the necessary preparations, effective countermeasures can be applied and the great majority of the casualties resulting from its use can be expected to survive.”⁶⁴

2. *The Hague Convention No. IV of 1907.*

Most States are parties to the Hague Convention No. IV of 1907,⁶⁵ and the International Military Tribunal at Nuremberg affirmed expressly that numerous provisions of the Hague Convention were merely declaratory of existing international law.⁶⁶

Article 23 of the Annex to Hague Convention No. IV Respecting the Laws and Customs of War on Land states:⁶⁷

... It is especially forbidden—

- a. To employ poison or poisoned weapons;
- b. To kill or wound treacherously individuals belonging to the hostile nation or army;
-
- e. To employ arms, projectiles, or material calculated to cause unnecessary suffering;

Although no specific mention was made of bacteriological warfare, the question arises as to whether it is nevertheless embraced within the language of Article 23. Is the United States Army making a proper interpretation of the treaty in stating that “the United States is not a party to any treaty, now in force, that prohibits or restricts the use in warfare . . . of bacteriological warfare”?⁶⁸

The prohibition of poison. Article 23(a) prohibits poison or poisoned weapons. It seems reasonable to state that bacteriological warfare in the present sense was not contemplated by this prohibition, as it did not exist in 1907. Therefore, the 1907 Hague Convention would not make it illegal to use micro-organisms (bacteria, viruses, rickettsiae, fungi, or protozoa) to produce illness.

However, it would appear that the biological warfare agents known as *toxins* are covered by the above prohibition and that

⁶³ ROSEBURY, PEACE OR PESTILENCE: BIOLOGICAL WARFARE AND HOW TO AVOID IT 58 (1949).

⁶⁴ Crozier, Tigertt, and Cooch, *The Physician's Role in the Defense Against Biological Weapons*, 175 J. AM. MEDICAL ASS'N 4, 8 (1961).

⁶⁵ Including the United States. See U.S. DEP'T OF ARMY, PAMPHLET NO. 27-1, TREATIES GOVERNING LAND WARFARE, 5-17 (1956).

⁶⁶ 22 SECRETARIAT OF THE NUREMBERG INTERNATIONAL MILITARY TRIBUNAL, TRIAL OF MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL: NUREMBERG, 14 NOVEMBER 1945 - 1 OCTOBER 1946, at 497 (1948).

⁶⁷ U.S. DEP'T OF ARMY, PAMPHLET NO. 27-1, *op. cit. supra* note 65, at 12.

⁶⁸ U.S. DEP'T OF ARMY, FIELD MANUAL NO. 27-10, THE LAW OF LAND WARFARE [hereinafter cited as FM 27-10] 18 (1958).

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their use would be illegal, for the reason that the toxins, although “poisons produced by living things,”⁶⁹ are nevertheless poisons which poison the victim rather than infect him with a disease produced by a micro-organism.

The prohibition of treachery. Article 28(b) prohibits killing or wounding treacherously. It might be argued that the use of microscopic germs, especially if employed covertly or without warning, would be a type of treachery. However, the element of surprise has long been regarded as one of the first principles of warfare. Land mines, booby traps, “time-on-target” artillery concentrations, delayed-action aerial bombs, and other military measures of similar type have not been considered treacherous. The term “treachery” carries a connotation of a breach of faith or confidence, and therefore it would not appear to apply to biological warfare if no other grounds existed for constituting its use an act of treachery.

The prohibition of “unnecessary suffering.” Article 23 (e) prohibits the use of “arms, projectiles, or material calculated to cause unnecessary suffering.” For the purpose of discussion at this point, it is necessary to eliminate from consideration the fact that the subject of biological warfare causes an emotional reaction of fear and repugnance and even of terror, and to discuss the subject strictly from the standpoint of physical suffering produced by the physical effects of biological warfare.

A simple objective standard by which to measure “unnecessary suffering” is impossible to establish. The intensity of suffering is to an extent subjective. Moreover, it is a relative term, both with reference to the importance of the military objective and

⁶⁹ U.S. CIVIL DEFENSE ADMINISTRATION, **WHAT YOU SHOULD KNOW ABOUT BIOLOGICAL WARFARE AGENTS 4** (1951).

“Toxins are . . . poisonous . . . substances . . . of microbial, plant, or animal origin.” U.S. DEPT OF ARMY, **TECHNICAL MANUAL No. 3-216, MILITARY BIOLOGY AND BIOLOGICAL WARFARE AGENTS 25** (1956). For example, botulinum toxin produces botulism, which is “a highly fatal, acute poisoning.” *Id.* at 77. Although the toxin is formed by the botulinum bacillus, “the bacteria do not grow or reproduce in the human body, and poisoning is due entirely to the toxin already formed.” *Id.* at 78. Likewise, staphylococcus toxin produces a “food poisoning (not infection),” even though the toxin itself is formed by staphylococci micro-organisms. *Id.* at 78-79.

Thus, it is seen that whereas micro-organisms such as bacteria and viruses produce diseases by the direct conflict of the living micro-organisms with the victim, on the other hand the toxins are inanimate substances which meet the definition of a *poison*: “A substance that through its *chemical* action kills, injures, or impairs an organism.” [Emphasis added.] WEBSTER, **THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 1751** (1961).

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with reference to the effects of other military means of equal utility.

Biological warfare is not one weapon but includes many different weapons. There is a wide spectrum of biological warfare agents available which vary greatly as to lethality (incidence of fatality), degree and length of incapacitation, and the nature, degree and period of discomfort or suffering.

It would be illegal to use a particular biological warfare agent solely because it causes suffering, or to use one that causes more suffering than another equally effective agent from a military standpoint.

There is no doubt that the amount of suffering caused by the biological warfare attack must be proportionate to a legitimate military end.⁷⁰ The judgment in this case would have to be made by the same process as in the case of the use of other weapons now considered "legal."

Beyond this point, the question can be considered from several other viewpoints :

(1) *By comparing the degree of suffering with that caused by other weapons definitely recognized as "legal."* Judged in this manner, it can be said that some biological warfare agents cause less suffering than that inflicted by shell fragments, aerial bombs, land mines, flame throwers, rifle bullets, etc. In some cases, little or no pain is felt.

(2) *By comparing the length of the period of suffering.* In the case of some biological agents, the painful effects would last for a much shorter period than those resulting from wounds caused by "conventional" weapons.

(3) *By comparing the length of the period of incapacitation.* Many biological agents are available which leave no permanent effects and which incapacitate individuals for much shorter periods than is many times the case for "conventional" weapons. Indeed, whereas biological warfare agents could be selected so as to have the physical effects disappear completely after a certain average period of time, it is impossible with most conventional weapons to control the harmful effects so as to restrict deliberately the seriousness of the wound, the intensity of the suffering it inflicts, or the length of time required for an end to the suffering and for complete recuperation.

⁷⁰ For a discussion of the principle of military necessity, see O'Brien, *The Meaning of "Military Necessity" in International Law*, 1 *WORLD POLITY* 109, 138-149 (1957).

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(4) *By comparing permanent effects.* Some biological warfare agents are much less likely to cause permanent effects than are the wounds inflicted by “conventional” weapons whose effects cannot be controlled or foreseen. Indeed, in the case of the “conventional” weapons, nothing can be done to obviate the possibility of permanent suffering, incapacitation, maiming, blinding, disfigurement, or mental impairment—or even death itself.⁷¹

From this analysis, it appears to be a reasonable judgment that, considered strictly from the standpoint of physical results, not all biological warfare agents would be per se illegal because of violating the Hague Convention rule against “unnecessary suffering.” Some agents might cause “unnecessary suffering” when judged in relation to the military objective or when compared with other equally effective military means; however, there are some biological warfare agents that cause less suffering and are much less likely to cause death or permanent injury than many “conventional” weapons now accepted as legal.

3. *The Geneva Protocol of 1925.*

The only general treaty now in force which specifically prohibits biological warfare by name⁷² is the Geneva Protocol of 1925.

There are forty-six States who have signed and ratified, or who have acceded to, the Geneva Protocol.⁷³ However, about half the

⁷¹ If the agent killed quickly with little or no suffering, it could not be objected to upon the basis of “unnecessary suffering.” However, if the agent caused almost certain death, it might be considered as proscribed by the St. Petersburg Declaration that outlawed weapons which make death inevitable. See pp. 57-58, *supra*.

⁷² Although the Protocol uses the term “bacteriological warfare.” See note 18 *supra*, and text accompanying.

⁷³ According to information which the writer received from the Treaty Section of the United States Department of State on April 11, 1962, the following States had signed and ratified, or had acceded to, the Protocol: Australia, Austria, Belgium, Bulgaria, Canada, Ceylon, Chile, China, Communist China, Czechoslovakia, Denmark, Egypt, Estonia, Ethiopia, Finland, France, Germany, Great Britain, Greece, Hungary, India, Iran, Iraq, Ireland, Italy, Latvia, Liberia, Lithuania, Luxembourg, Mexico, Netherlands, New Zealand, Norway, Pakistan, Poland, Portugal, Rumania, Spain, Sweden, Switzerland, Thailand, Turkey, Union of South Africa, Union of Soviet Socialist Republics, Venezuela, and Yugoslavia.

Of the States who signed the Protocol, only six have not ratified it: Brazil, El Salvador, Japan, Nicaragua, United States of America, and Uruguay.

The total of forty-six States parties to the Protocol includes the three Baltic States of Estonia, Latvia, and Lithuania, which signed and ratified the treaty as independent States prior to World War II, although they are now incorporated into the U.S.S.R. The figure also includes Communist China separately from China, Communist China having notified the United Nations in 1952 that it was recognizing the 1927 accession of China to the Protocol. See p. 51, *supra*.

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ratifying States have made the reservations that the treaty is binding upon them only with reference to States who are also parties to the Protocol, and that it ceases to be binding towards **any** State whose armed forces or the armed forces of whose allies fail to observe the treaty.⁷⁴

Even though the United States and Japanese delegations helped to draft, and signed the Protocol, neither State has ratified the **treaty**.⁷⁵ Moreover, in December 1941, after Japan had entered World War II, she failed to reply to a British request that she signify her intention to observe the Geneva Protocol.⁷⁶ The United States Army's field manual, *The Law of Land Warfare*, states that the Geneva Protocol, not having been ratified, "is accordingly not binding on this country."⁷⁷ For that reason, the text of the Protocol is not found in the pamphlet, *Treaties Governing Land Warfare*,⁷⁸ which is intended to serve as a supplement to the field manual.

Inasmuch as the Geneva Protocol is the only treaty by which a large number of States have agreed to refrain from employing bacteriological warfare, it is important to consider how effective the treaty itself has been in the past and how effective it is likely to be in the future, even with regard to those States who are parties to the treaty. Such a judgment necessarily involves speculation, even with reference to the past, but there are certain facts which may be of value in making an evaluation of the true efficacy of the Protocol.

It does not appear that the Geneva Protocol played a major role, if any, in the fact that bacteriological warfare was not used during World War II. As mentioned above, Japan did not acknowledge a formal request that she promise to abide by the Protocol. After the United States entered the war, the U.S. Secretary of War recommended to the Secretary of State that the United States

⁷⁴ The reservations of the U.S.S.R. read :

"The said Protocol only binds the Government of the U.S.S.R. in relation to the States which have signed and ratified or which have definitely acceded to the Protocol.

"The said Protocol shall cease to be binding on the Government of the U.S.S.R. in regard to all enemy States whose armed forces or whose allies *de jure* or in fact do not respect the restrictions which are the object of the Protocol." UNSC/OR, 577th Meeting, 18 June 1952, at 21.

The reservations of other States, including Great Britain and France, are similar.

⁷⁵ See note 73, *supra*.

⁷⁶ BROPHY AND FISHER, *THE CHEMICAL WARFARE SERVICE: ORGANIZING FOR WAR* 49 n. 1 (1959).

⁷⁷ FM 27-10, at 19.

⁷⁸ U.S. DEP'T OF ARMY, PAMPHLET No. 27-1, *op. cit.* *supra* note 65.

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not make a unilateral declaration of intention to observe the Protocol.⁷⁹ Italy, which had ratified the Protocol, violated the treaty by using gas against Ethiopia, although using the excuse of reprisals (not in kind).⁸⁰ Although Germany answered a British inquiry shortly after the start of World War II by replying that she would abide by the Protocol subject to **reciprocity**,⁸¹ nevertheless she continued with large-scale development and manufacture of war gases.

In view of these facts and the lively activity of several States⁸² in the development and manufacture of gas, it appears unlikely that it was the deterrent effect of the Geneva Protocol that prevented the use of chemical warfare during World War II, but rather the fear of retaliation⁸³ and the lack of decisive advantage offered by such weapons at the time. As far as bacteriological warfare is concerned, this method was not yet well enough developed to offer a decisive advantage; here, too, the fear of retaliation may have exerted a deterrent effect.⁸⁴ During the 1952 debate in the United Nations, representatives of Greece and Brazil stated that it was fear of retaliation, not the Protocol, which had prevented the use of gas and germ warfare during World War II.⁸⁵

Even if the intensive biological warfare research activities carried on during World War II⁸⁶ were intended solely for defensive retaliatory purposes as stated, the extent of BW research and of preparations for possible use of germ warfare indicates that several States had serious doubts regarding the potential effectiveness of the Geneva Protocol alone in placing restrictions on enemy use of that weapon.

⁷⁹ See BROPHY AND FISHER, *op. cit.* supra note 76, at 49–50.

⁸⁰ See LEAGUE OF NATIONS, OFFICIAL JOURNAL, 17TH ASSEMBLY 580 (1936).

⁸¹ STONE, LEGAL CONTROLS OF INTERNATIONAL CONFLICT: A TREATISE ON THE DYNAMICS OF DISPUTES- AND WAR-LAW 554 (rev. ed. 1959).

⁸² See, e.g., BROPHY AND FISHER, *op. cit.* supra note 76, at 86–90; BROPHY, MILES, AND COCHRANE, THE CHEMICAL WARFARE SERVICE: FROM LABORATORY TO FIELD 74 (1959); Kelly, *Gas Warfare in International Law*, 9 MIL. L. REV. 1, 36–42 (1960).

⁸³ See STONE, *op. cit.* supra note 81, at 354n. Hitler's Minister of Munitions told the International Military Tribunal at Nuremberg that it was for fear of retaliation that Germany refrained from using chemical warfare. See 16 SECRETARIAT OF THE NUREMBERG INTERNATIONAL MILITARY TRIBUNAL, *op. cit.* supra note 66, at 527–528.

⁸⁴ Marshal Keitel and other Germans averred that bacteriological warfare research was purely for defensive purposes. See 21 *id.* at 546–562; 22 *id.* at 91–92, 316–317. The individual in charge of the United States' bacteriological warfare research program during World War II likewise stated the purpose of the U.S. program as defensive. The New York Times, January 4, 1946, p. 13, col. 2.

⁸⁵ See UNSC/OR, 578th Meeting, 20 June 1952, at 3, 9.

⁸⁶ See BROPHY, MILES, AND COCHRANE, *op. cit.* supra note 82, at 101–122.

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Further doubt is cast on the future efficacy of the Geneva Protocol by reading the verbatim record of the discussions which resulted in the inclusion of a ban on bacteriological warfare in the Protocol.⁸⁷ The Geneva Conference itself had been called for the purpose of regulating traffic in, and limiting, arms of all kinds. The United States proposed a ban on the export of war gases.⁸⁸ Then the Polish delegation proposed that “. . . inasmuch as the materials used for bacteriological warfare constitute an arm that is discreditable to modern civilization, . . . any decisions taken by the Conference concerning the materials used for chemical warfare should apply equally to the materials employed for bacteriological warfare.”⁸⁹

At the suggestion of the Turkish delegate, who stated that it was not enough to prohibit the export of chemical weapons (as that action would place non-producing States at a military disadvantage), it was agreed that a committee “should first pronounce upon the question of principle in the matter of chemical warfare.”⁹⁰

The Swiss delegate referred to chemical and bacteriological weapons as “likely to cause unnecessary harm,” and said that the prohibition placed on chemical warfare weapons by “the conscience and practice of nations . . . should apply also to bacteriological warfare,” and that “means of chemical warfare in particular are included among the implements and materials ‘prohibited by international law.’ ”⁹¹ He added :

Considering that it is almost always impossible in practice to prohibit the export of these materials and implements of warfare, . . . every effort should be made to conclude . . . a universal Convention codifying the aforementioned principle of international law [so as to give] practical effect to the prohibition of chemical and bacteriological warfare.⁹²

Later, the Drafting Committee proposed that the Conference, . . . Considering that the prohibition of the export of materials and devices destined for use in chemical and bacteriological warfare is in most cases practically impossible, and would be of no effect until all nations undertook to abstain from their use, . . . recognize the existence even now of this prohibition [of use] (at least as regards the means employed in waging chemical warfare) as a binding stipulation of international law.⁹³

⁸⁷ See League of Nations Document A.13.1925.IX, at 161–162, 306–316, 339–342, 364–365, 528–541, 546–548, 577, 596–598, 601, 739–740, 745, 779–780.

⁸⁸ *Id.* at 161.

⁸⁹ *Zbid.*

⁹⁰ *Id.* at 162.

⁹¹ *Id.* at 306.

⁹² *Zbid.*

⁹³ *Id.* at 307.

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The Military Technical Committee concurred and stated :

The radical solution of the terrible problem would be found in a solemn and unusual undertaking on the part of all the peoples of the world to regard chemical warfare as prohibited by the law of nations.⁹⁴

Some consideration was given to calling a special conference to adopt a treaty formally prohibiting the use of chemical and bacteriological weapons, but the United States suggested that it would be a better solution to have the States at the Geneva Conference draw up and sign such a **treaty**.⁹⁵ During the discussion of this proposal, the Norwegian delegate said that it was his opinion that

... you cannot regulate war; you can only abolish it. . . . You cannot humanize a tiger; you can only kill it. Once war is let loose, it is impossible to prevent the use of the most horrible methods. Our problem therefore is not the regulation of war; it is the abolition of war. . . . The formula which will be adopted [prohibiting chemical and bacteriological means] will merely be another stone on that road paved with good intentions which leads to a place of which we have all heard.⁹⁶

The French delegate also doubted the effectiveness of such a prohibition, and saw the only certain solution to be the abolition of war by confronting a possible aggressor with the opposition of the "armed forces of all civilized nations."⁹⁷

It was decided to proceed on the basis that the Geneva Conference itself would adopt a protocol rather than wait for a special conference to consider a ban.⁹⁸

Despite the fact that the inclusion of bacteriological warfare in a prohibition had been mentioned several times during the preceding discussions, the first Draft Protocol presented by the Drafting Committee omitted any reference to bacteriological warfare.⁹⁹

The Polish delegate called attention to his previous proposal, devoted several minutes to discussing "the terrible consequences for the human race should bacteriology become the servant of the instincts of hate and destruction," and again suggested that all decisions taken by the Conference should also apply to means of bacteriological warfare.¹⁰⁰

The United States delegate said that although

...the subject of bacteriological warfare is not included in the instructions of the United States delegation . . . bacteriological warfare is so revolting and so foul that it must meet with the condemnation of all

⁹⁴ *Id.* at 308-309.

⁹⁵ *Id.* at 310.

⁹⁶ *Id.* at 313.

⁹⁷ *Id.* at 314-315.

⁹⁸ *Id.* at 316.

⁹⁹ *Id.* at 340.

¹⁰⁰ *Id.* at 340-341.

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civilized nations, and hence my delegation accepts this amendment proposed by the Polish delegate.¹⁰¹

The French delegate said that although he thought

...that the extremely wide form of words: "Considering that the use in war of asphyxiating, poisonous or other gases, and of all analogous liquids, materials, or devices . . ." should have been sufficient to cover bacteriological warfare . . . it is not always a disadvantage to make an explicit reference.¹⁰²

Whereupon, the Conference voted to instruct the Drafting Committee to include bacteriological warfare in the Draft Protocol.¹⁰³ With no further discussion, the revised text was later adopted by the General Committee and by the Plenary Meeting of the Conference.¹⁰⁴

Thus, this examination of the Proceedings of the Geneva Conference indicates that the extension of the ban on chemical warfare to bacteriological warfare was largely in the nature of an afterthought, and was accomplished only through the initiative and persistence of the Polish delegate.

Turning now to the 1952 debate in the United Nations, we find that a number of States had doubts that the Protocol itself would be effective under present conditions. Although the Soviet representative stated that during World War II the treaty had

...proved an effective restraining influence on the aggressive States. . . .

The aggressors could not fail to take into account the enormous importance, from the point of view of international politics, law, and morality, of the Protocol's prohibition of the use of chemical and bacterial weapons in war,

yet he admitted that "some differences of opinion existed among statesmen and leading public figures on the admissibility of the use of bacterial weapons." ¹⁰⁵

Although France's representative stated that the Protocol "has retained all its legal value and moral authority,"¹⁰⁶ Great Britain doubted that an aggressor would refrain from using such weapons.¹⁰⁷ Pakistan doubted the efficacy of the treaty;¹⁰⁸ and Greece's representative expressed the opinion that "the Geneva Protocol is obsolete and outstripped by subsequent events."¹⁰⁹ China's representative said that "the Geneva Protocol of 1925 in fact did not

¹⁰¹ *Id.*, at 341.

¹⁰² *Ibid.*

¹⁰³ *Id.*, at 341.

¹⁰⁴ *Id.*, at 365, 423.

¹⁰⁵ UNSC/OR, 7th Year, 577th Meeting, 18 June 1952, at 15-16.

¹⁰⁶ *Id.*, 581st Meeting, 26 June 1952, at 15.

¹⁰⁷ *Id.*, 578th Meeting, 20 June 1952, at 13.

¹⁰⁸ *Id.*, 582d Meeting, 25 June 1952, at 3-4.

¹⁰⁹ *Id.*, 578th Meeting, 20 June 1952, at 9.

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solve the problem. . . . The whole scheme was based on the good faith of subscribing States. It is unfortunate but it is a fact that faith is lacking." He stated that the Protocol was "defective" because it lacked guarantees, safeguards, or controls.¹¹⁰ All the States just mentioned are parties to the Protocol.

During the U.N. debate, Brazil—which is not a party to the treaty—described it as "inadequate" and stated that it ("has lost its usefulness.")¹¹¹ The American representative, in explaining the unwillingness of the United States to ratify the Protocol, said that "the world has moved since 1925, and the question of ratification today must be viewed in the light of today's facts. . . . My government proposes not the exchange of paper promises against the use of such weapons, but the absolute elimination of such weapons."¹¹² Several weeks earlier, the U.S. representative in the U.N. Disarmament Commission referred to the treaty as "a twenty-seven-year old protocol which, under modern conditions and in the light of the practices of some States, has become obsolete."¹¹³

Still another fact that casts doubt on the future effectiveness of the pact is that many States, including major powers, have become parties with reservations. Inasmuch as it is likely in any future war involving major powers that States who are parties will be allied with States who are not, real difficulty may result from the fact that many States have accepted the obligations of the Protocol only towards those States who are themselves parties, and that they have made reservations by which they have specifically asserted their right to take reprisals in kind. The British¹¹⁴ and the United States¹¹⁵ representatives to the United Nations stated that by making use of the latter reservation a belligerent might use the excuse of reprisals to abrogate his treaty commitments merely by making false charges of violation by an enemy.¹¹⁶

Scepticism regarding the future effectiveness of the Geneva Protocol is increased further when thought is given to the fact that the history of war and the experience of attempts to prohibit certain methods of warfare show that no conference has been successful in banning a weapon though vital at the time and that the prohibition against some weapons was revoked or ignored

¹¹⁰ *Id.*, 579th Meeting, 20 June 1952, at 2-3.

¹¹¹ *Id.*, 578th Meeting, 20 June 1952, at 9.

¹¹² *Id.*, 577th Meeting, 18 June 1952, at 21, 24.

¹¹³ UNDC/OR, 11th Meeting, 28 May 1952, at 4.

¹¹⁴ UNSC/OR, 578th Meeting, 20 June 1952, at 16.

¹¹⁵ UNSC/OR, 577th Meeting, 18 June 1952, at 21-22.

¹¹⁶ For a comprehensive study on the subject of reprisals, see COLBERT, *RETALIATION IN INTERNATIONAL LAW* (1948).

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once they became — through their own development or because of changed conditions-of significant military utility.¹¹⁷

B. INTERNATIONAL CUSTOM

Another of the sources of international law which Article 38 of the Statute of the International Court of Justice directs the Court to apply is “international custom, as evidence of a general practice accepted as law.”

Custom in its legal sense means something more than mere habit or usage; it is a usage felt by those who follow it to be an obligatory one. . . . Evidence that a custom in this sense exists in the international sphere can be found only by examining the practice of states. . . . What is sought for is a general recognition among states of a certain practice as obligatory.¹¹⁸

1. State Practice Regarding Biological Warfare.

Does the practice of States provide evidence of general acceptance among them of an obligation, independent of specific treaty requirements, to refrain from the employment of biological warfare? On the contrary, has the failure to use biological warfare in the past been the result of an insufficiently developed weapon, of the absence of a remunerative military target, or of policy adopted for various reasons such as the fear of retaliation or concern about public opinion?

The United States. An examination of the practice of the United States for evidence of “custom” is of special importance because the United States—unlike Russia, Great Britain, France, Germany, China, and Italy—is not party to any treaty specifically prohibiting biological warfare.

The U.S. War Department secretly began a biological warfare study in 1941,¹¹⁹ and shortly later specially designed laboratories and pilot plants were built,¹²⁰ for the stated purpose of formulating defensive measures and procedures for retaliation.¹²¹

¹¹⁷ See, e.g., ROYSE, AERIAL BOMBARDMENT AND THE INTERNATIONAL REGULATION OF WARFARE (1928); STONE, LEGAL CONTROLS OF INTERNATIONAL CONFLICTS: A TREATISE ON THE DYNAMICS OF DISPUTES- AND WAR-LAW 551 (rev. ed. 1959); Barnes, *Submarine Warfare and International Law*, 2 WORLD POLITY 121 (1960); Dragic, *The Use of Biological Agents for War Purposes, Biological Agents in War: Yugoslavia 5, 17* (English reprint 1959); Lindquist, *Chemical and Biological Warfare*, 169 J. AM. MEDICAL ASS'N 128, 129, 356, 357 (1959); Stowell, *The Laws of War and the Atomic Bomb*, 39 AM. J. INT'L L. 784 (1945).

¹¹⁸ BRIERLY, THE LAW OF NATIONS 60-62 (5th ed. 1955).

¹¹⁹ See ROSEBURY, PEACE OR PESTILENCE: BIOLOGICAL WARFARE AND HOW TO AVOID IT 6 (1949).

¹²⁰ See BROPHY AND FISHER, *op. cit. supra* note 76, at 48; ROSEBURY, *op. cit. supra* note 119, at 7.

¹²¹ See BROPHY, MILES, AND COCHRANE, *op. cit. supra* note 82, at 104.

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After the war, Admiral Leahy, wartime Chief of Staff to Presidents Roosevelt and Truman, wrote that during the war there had been discussions among U.S. government officials about bacteriological warfare, although we did not use BW.¹²²

However, by the end of the war the U.S. War Department could report that “the Allies had surpassed the Axis on secret research into germ warfare, and were preparing to act both defensively and offensively if Germany or Japan had started such warfare against us.”¹²³

After the release of the *Merck Report*¹²⁴ early in 1946 disclosing the U.S. wartime research activities had set off a chain of speculation, mostly depicting the fearsome effects of germ warfare, Army Chief of Staff Dwight Eisenhower issued an order forbidding any future mention of the term “biological warfare” by military officials “in public.”¹²⁵ Nevertheless, articles continued to appear in magazines, stressing sensational aspects of BW, so that early in 1949 U.S. Secretary of Defense Forrestal felt it necessary to issue a statement saying that the effects of biological warfare had been greatly exaggerated.¹²⁶

Speaking at the United Nations in 1946, a United States delegate insisted that any scheme for international control of armaments must include such weapons as biological warfare. He said:

We see no reason why one who is infected by a biological germ has any better prospect of revival and rehabilitation than one who is a victim

¹²² “We were not forced to use the equally terrible instruments of bacteriological warfare. At intervals this subject came up in my conversations with President Roosevelt and later with President Truman. I recall particularly that as we were sailing for Honolulu for the MacArthur-Nimitz conferences in July of 1944, there was a spirited discussion of bacteriological warfare in the President’s cabin. By that time the scientists thought, for example, that they could destroy completely the rice crop of Japan. Some of those present advocated such measures.

“Personally, I recoiled from the idea and said to Roosevelt, ‘Mr. President, this [using germs and poisons] would violate every Christian ethic I have ever heard of and all of the known laws of war. It would be an attack on the noncombatant population of the enemy. The reaction can be foretold—if we use it, the enemy will use it.’ Roosevelt remained noncommittal throughout this discussion, but the United States did not resort to bacteriological warfare.” LEAHY, *I WAS THERE* 439–440 (1950).

¹²³ The New York Times, January 4, 1946, p. 13, col. 2.

¹²⁴ Merck, *Biological Warfare, Report to the Secretary of War*, 98 MILITARY SURGEON 237 (1946).

¹²⁵ The order was issued three months after the report. The New York Times, March 13, 1949, p. 1, col. 2.

U.S. Secretary of State Byrnes referred to BW as “an even more frightful method of human destruction” than the atomic bomb, and Walter Lippman described it as “even more deadly and malignant” than the atomic bomb. See ROSEBURY, *op. cit. supra* note 119, at 175.

¹²⁶ See The New York Times, March 13, 1949, p. 1, col. 2.

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of the atomic bomb. And we see no reason why these other deadly measures shall not be included in any plan of **disarmament**.¹²⁷

In 1950, the U.S. Secretary of Defense recommended to the President that the United States be adequately prepared to cope with biological **warfare**.¹²⁸ Early in 1952, his successor, anticipating that the Communist germ warfare charges might indicate an intention to resort to such use, stated we might retaliate, and said: "They open—the moment they get into that type of thing—they open a vast area which the decent world has abstained from using."¹²⁹

During the 1952 debate in the United Nations, the American representative said:

The people of the United States, along with the rest of the decent world, are sickened at the very thought of the use of weapons of mass destruction. We are sickened also by aggression and by the threat of aggression. That is why the United States stands ready to eliminate weapons of mass destruction through the establishment of an effective system based upon effective safeguards so that their use may be prohibited effectively and would indeed be impossible.¹³⁰

The public opinion of the United States, and the public opinion of the rest of the free world, abhors the very thought of using these weapons, and that is why we are dedicated to efforts to make it possible to eliminate them.¹³¹

A few months later U.S. Secretary Dean Acheson told the U.N. General Assembly on October 16, 1952:

We will not commit aggression with chemical weapons or bacteriological weapons, which we have been falsely and slanderously accused of using.¹³²

Yet, on November 6, 1955, U.S. Army Secretary Brucker approved "implementation" of a civilian advisory committee report. It called for development of a complete family of CBR weapons for "actual use" if necessary. It decried the conception that such forms for warfare were "horrifying in character" and said that they had a "proper place" in military planning:

Recognition must be given to these weapons as having unique potential in warfare without associated destruction of facilities and the attendant problems of rehabilitation. Recognition must also be given to the ability of these weapons to weaken the "will to fight" of the enemy's military personnel and civilian population without attendant loss of lives or permanent injury.¹³³

¹²⁷ The New York Times, December 3, 1946, p. 4, col. 2.

¹²⁸ *Id.*, January 31, 1950, p. 10, col. 2.

¹²⁹ *Id.*, May 17, 1952, p. 2, col. 8.

¹³⁰ UNSC/OR, Seventh Year, 577th Meeting, 18 June 1952, at 23.

¹³¹ *Id.*, 583d Meeting, 26 June 1952, at 3.

¹³² 27 DEP'T STATE BULL. 641 (1952).

¹³³ The New York Times, November 7, 1955, p. 13, col. 3.

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The committee conceded that “current concepts of warfare” did not envision use of chemical and biological warfare by this country. But it said the military must be capable of adapting such developments “to our military needs and concepts.” The committee particularly urged that the Army Chemical Corps undertake a public relations campaign to achieve “a more candid recognition of the proper place of chemical and biological warfare.”¹³⁴

In 1959, **U.S.** Representative Robert W. Kastenmeier of Wisconsin introduced a resolution (HCR 433), which called for a reaffirmation of President Roosevelt’s declaration of 1943 that we would not use bacteriological weapons unless they were first used against us. The resolution was not reported out by the House Foreign Affairs Committee.¹³⁵ Shortly before, the House Committee on Science and Astronautics had urged trebling of this country’s expenditures on CBR research and development.¹³⁶ Two months later, in arguing that we must have in being a sufficient retaliatory capability, the Chief of the Army Chemical Corps said :

We must make it clear to the whole world—our friends and allies as well as our potential enemies—that our Nation is in the business of chemical and biological preparedness only to deter or defeat Toxic CBW attack.¹³⁷

Later in 1959, there was an unconfirmed newspaper report that the Army was seeking the reversal of a policy recommendation by the National Security Council that the United States should not use CBR weapons in war except in retaliation.¹³⁸ During a news conference in January 1960, in reply to a question whether the United States might change a “traditional policy of not using chemical, gas, or germ warfare first,” President Eisenhower replied that he had received no official suggestion from the armed services, and that “so far as my own instinct is concerned, is not to start such a thing as that first.”¹³⁹

In 1960, the Director of the U.S. Army’s Research and Development branch, Dr. Richard Morse, said that “the psychological abhorrence of the term bacteriological warfare” must not cause us not to face the facts that it will be available not only to us but to

¹³⁴ *Ibid.*

¹³⁵ See 190 **THE NATION** 34 (1960).

¹³⁶ The New **York Times**, August 9, 1959, p. 3, col. 1.

¹³⁷ Stubbs, *Soldier Volunteers Confirm Psychochemical Spell: CBW Support Zs Sought*, Army-Navy-Air Force Journal, Oct. 31, 1959, pp. 1, 27.

¹³⁸ See The New **York Times**, November 10, 1959, p. 1, col. 1, p. 30, col. 2.

¹³⁹ The New **York Times**, January 14, 1960, p. 14, col. 1.

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our enemies, although "thinking people know we will not use this weapon first."¹⁴⁰

The U.S. Army's field manual, *The Law of Land Warfare*, states that "the United States is not a party to any treaty, now in force, that prohibits or restricts the use in warfare . . . of bacteriological warfare," and that in view of the Senate's not having given approval to the 1925 Geneva Protocol banning bacteriological warfare, that treaty "is accordingly not binding on this country."¹⁴¹

Is the fact that the manual includes a reference only to the lack of treaty restrictions a refusal to take a firm position as to whether or not BW is forbidden by international custom or general principles? The question is suggested by the fact that the manual specifically states the absence of a customary rule restricting the employment of atomic weapons¹⁴² and that the use of weapons which employ fire is not violative of international law.¹⁴³ However, taking the manual as it reads, it must be judged to suggest that the use of bacteriological warfare is not prohibited by international custom.

The U.S. *Law of Naval Warfare* states, in referring to BW weapons, that "it remains doubtful that, in the absence of a specific restriction established by a treaty, a state is legally prohibited at present from resorting to their use. However, it is clear that the use . . . may be considered justified against an enemy who first resorts to the use of these weapons."¹⁴⁴

A footnote to that paragraph states that "bacteriological weapons may be used only if and when authorized by the **President**."¹⁴⁵

¹⁴⁰ *Id.*, August 28, 1960, p. 33, col. 3.

¹⁴¹ FM 27-10, at 18-19. It is important to examine statements in such manuals of armed forces, because "in determining whether a custom or practice exists military regulations may play an important role." U.S. Military Tribunal at Nuremberg. See 11 TRIAL OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW No. 10, at 1237 (U.S.S.P.O. 1950).

In this regard, the U.S. manual itself states: "This Manual is an official publication of the United States Army. However, those provisions of the Manual which are neither statutes nor the text of treaties to which the United States is a party should not be considered binding upon courts and tribunals applying the law of war. However, such provisions are of evidentiary value insofar as they bear upon questions of custom and practice." FM 27-10, at 3.

¹⁴² *Id.*, para. 35.

¹⁴³ *Id.*, para 36.

¹⁴⁴ TUCKER, THE LAW OF WAR AND NEUTRALITY AT SEA, U.S. NAVAL WAR COLLEGE INTERNATIONAL LAW STUDIES 357, 410 (1957) (Annotated Appendix on *The Law of Naval Warfare* at 357-422).

¹⁴⁵ *Id.* at 416.

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The **U.S.** Army's field manual on the tactics and techniques of bacteriological warfare says that "authority to initiate employment of toxic agents does not rest with the local commander. The local commander can expect to receive guidance relating to the employment of toxics through command channels. . . . Subject to policy restrictions of the theater commander, operations involving the use of toxic biological agents will normally be planned and executed by corps and higher units," whereas toxic chemical agents can be employed, subject to the same restrictions, by divisions and higher units.¹⁴⁶

Although the Army manual does not cover that point, it seems likely that the theater commander could not adopt a policy permitting the use of biological warfare agents until such authorization had been given initially by the President, as stated by the Navy manual.

A reasonable judgment based on the foregoing evidence is that present United States *policy* appears to be not to use biological warfare *first*, but to use it only in retaliation. However, there does not appear to be a belief that a practice of non-employment of biological warfare has grown into international custom obliging States under international law to refrain from its use. Rather, the policy appears to be based on other factors, including public opinion in the United States and other countries. However, public opinion can change, especially under the pressures of war. In the meantime, the United States is expanding constantly its activity in the development of defensive and offensive capabilities in chemical and biological warfare. In voting a record peace-time arms budget of \$47.8 billion on April 13, 1962, the House Appropriation Committee provided for a fifty percent increase in Army chemical and biological warfare research and development funds, including greater emphasis on "incapacitating agents" which do not permanently harm people.¹⁴⁷ It is interesting to note that such temporarily incapacitating agents would appear to be better suited for purely military offensive purposes than for punitive retaliation.

The U.S.S.R. Despite her frequent denunciation of bacteriological warfare, especially during the 1952 U.N. debates, the Soviet Union apparently recognized that no binding international custom yet **existed** when she conceded that "some differences of

¹⁴⁶ See U.S. DEP'T OF ARMY, FIELD MANUAL NO. 3-5, TACTICS AND TECHNIQUES OF CHEMICAL, BIOLOGICAL, AND RADIOLOGICAL (CBR) WARFARE 4-5 (1958).

¹⁴⁷ The Washington Post, April 14, 1962, p. A6, col. 1.

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opinion existed among statesmen and leading public figures on the admissibility of the use of bacterial weapons.”¹⁴⁸

The Russian Minister of Defense, Marshal Zhukov, told the Communist Party Congress that the Soviet armed forces were being rebuilt on the basic assumption “that the means and forms of future war will differ in many respects from past wars.” He said that a future war “will be characterized by the massive use of air forces, various rocket weapons, and various means of mass destruction such as atomic, thermonuclear, chemical, and bacteriological weapons.”¹⁴⁹ Later, a Russian colonel stated that such weapons would be of great value in staging a surprise attack.¹⁵⁰

The Chief of the U.S. Army Chemical Corps has stated that the Russians have conducted “an intensive program of mass education in civil defense against chemical and biological warfare,” and “have conducted research and development leading to the large scale production and storage of disease producing and toxic agents.”¹⁵¹

Thus, Soviet defense programs and official statements seem to indicate that the Russians do not believe that there has been established an international custom which would prohibit biological warfare independently of treaty obligations.¹⁵²

Great Britain. In 1954, the British Minister of Supply stated that until it was possible to abolish “revolting methods of conducting warfare,” such as bacteriological warfare, his Ministry, which specialized in secret weapons research, would continue experimenting on defense against bacteriological warfare.¹⁵³

The British manual on the law of war states that the 1925 Geneva Protocol is among the conventions which “are, strictly speaking, binding only on the states which have agreed to them and have not subsequently denounced them.”¹⁵⁴ The fact that the manual, in calling attention¹⁵⁵ to the reservations by Britain and other States confining the treaty obligation to BW abstention among themselves, does not indicate that the reservation has lost

¹⁴⁸ UNSC/OR, 577th Meeting, 18 June 1952, at 15-16.

¹⁴⁹ Current Digest of the Soviet Press, April 18, 1956, p. 11.

¹⁵⁰ See GARTHOFF, SOVIET IMAGE OF A FUTURE WAR 97 (1959).

¹⁵¹ See Stubbs, *supra* note 137, at 24-25.

¹⁵² Despite the fact that a Soviet military court convicted Japanese officers of bacteriological warfare and thus, inasmuch as Japan was not a party to the Geneva Protocol, may have assumed a prohibition of bacteriological warfare by customary law. See pp. 83-84 *infra*.

¹⁵³ See The New York Times, March 23, 1954, p. 3, col. 1.

¹⁵⁴ THE WAR OFFICE, THE LAW OF WAR ON LAND: BEING PART III OF THE MANUAL OF MILITARY LAW 4 (1958).

¹⁵⁵ *Id.* at 4 n. 3.

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any of its force would appear to assume that there is no international custom which would forbid biological warfare independently of the Geneva Protocol.

France and West Germany. The French¹⁵⁶ and West German¹⁵⁷ army manuals on the law of war merely mention the prohibition of bacteriological warfare by the Geneva treaty.

Summary. Custom develops from practice, but biological warfare in the present sense is simply too new for a pattern of practice to have developed. Research did not **start** in earnest until during World War II, and even now the effectiveness and utility of various BW agents under wartime conditions have not been demonstrated in actual practice.

It is a fact that official statements of the leaders and representatives of many States have denounced biological warfare, but as one respected writer has said :

There are multifarious occasions on which persons who act or speak in the name of a state do acts or make declarations which either express or imply some view on a matter of international law. Any such act or declaration may, so far as it **goes**, be some evidence that a custom, and therefore that a rule of international law, **does** or **does not** exist; but, of course, its value as evidence will be altogether determined by the occasion and the circumstances. States, like individuals, often put forward contentions for the purpose of supporting a particular case which do not necessarily represent their settled or impartial opinions; and it is that opinion which has to be ascertained with as much certainty as the nature of the case allows.¹⁵⁸

Moreover, the international force of any purported rule of international law is dependent to a degree upon the support of larger States, especially with respect to matters with which such States are particularly concerned.¹⁵⁹ The United States, one of the world's two strongest military powers, has consistently refused to ratify the Geneva Protocol, and is conducting an increasingly larger BW research program. Russia, Great Britain, France, and many other countries who have ratified the Protocol have done so with reservations. Russia, Great Britain, Canada, and other countries are doing bacteriological warfare research.

¹⁵⁶ LUBRANO-LAVADERA, *LES LOIS DE LA GUERRE ET DE L'OCCUPATION MILITAIRE* 28 (1956).

¹⁵⁷ 3 HANDBUCH DES WEHRRECHTS, para. 1519 (Brandstetter ed. 1961). The manual merely **quotes** the Protocol verbatim and without comment, but in a note calls attention to the various reservations. Germany had made no reservations.

¹⁵⁸ BRIERLY, *op. cit. supra* note 118, at 61.

¹⁵⁹ For example, at the turn of the century England's attitude toward maritime law carried decisive weight. See 1 THE HAGUE PEACE CONFERENCES OF 1899 AND 1907, at 37 (Scott ed. 1909).

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Thus, it appears obvious that the practice of States with reference to biological warfare, especially in view of the newness of its development for purposes of mass use and its doubtful effectiveness compared with that of other weapons available, has not established a binding international custom which prohibits biological warfare independently of treaty obligations, certain customs of a general nature, or general principles of law.

2. *The Distinction Between Combatants and Non-Combatants.*

Even though the practice of States gives no evidence of a custom having developed to provide a specific obligation for States to refrain from biological warfare, we should consider whether BW is nevertheless banned by a general custom, *e.g.*, the distinction between combatants and non-combatants.

The World War II practice of aerial saturation bombardment and the experience of two world wars in submarine warfare did considerable damage to the traditional distinction between combatants and non-combatants. This distinction was likewise weakened by ideological conflict between States, economic warfare, and the concept of total war, to the extent that many writers have questioned whether customary international law still recognizes this distinction.¹⁶⁰

One respected writer has stated that the phenomenon of total war has reduced to a hollow phrase in most respects what some had regarded in the past as the most fundamental principle of the law of war, namely, the distinction between combatants and civilians. He said :

There is only one principle which has remained unchallenged by civilized states and which must remain undisputed as a dictate both of law and of humanity. That unchallenged principle is embodied in the rule

¹⁶⁰ *see, e.g.*, STONE, *op. cit. supra* note 117, at 629-631; THE LAW OF NATIONS: CASES, DOCUMENTS, NOTES 1013-15 (Briggs ed. 1952); O'Brien, *Legitimate Military Necessity in Nuclear War*, 2 WORLD POLITY 35, 83-86 (1960).

Josef L. Kunz, recalling that the loss of the "communitas Christiana" in the sixteenth century resulted in the inhumanity and cruelties of the "total" Thirty Years' War, states that the retrogressive movement which afflicted the laws of war after 1914 has brought us back to "where we started in the sixteenth century, at the threat of total, lawless war, but this time with weapons which may ruin all human civilization, and even threaten the survival of mankind on this planet." Kunz, *The Laws of War*, 50 AM. J. INT'L L. 313 (1958).

Another writer says: "Today the whole nation is in arms and the victory is won by breaking the will of the whole nation to continue the fight. Hence it has become logical to bring pressure to bear on the civilian population in order that they may induce the government to yield." Stowell, *supra* note 117, at 785.

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that non-combatants, whether in occupied territory or elsewhere, must not be made the object of attack unrelated to military operations and directed exclusively against them.¹⁶¹

A fair appraisal appears to be this: Although the appearance of more powerful “blind” weapons of war and the tendency of ideological conflict to make war more “total” have weakened the traditional distinction between combatants and non-combatants, yet it survives—as evidenced by the Nuremberg Trials and the 1949 Geneva Conventions for the Protection of War Victims.¹⁶²

Thus, while the U.S. Army field manual on *The Law of Land Warfare* states that “under the law of the United States, one of the consequences of the existence of a condition of war between two States is that every national of the one State becomes an enemy of every national of the other,” the manual adds in the next sentence: “However, it is a generally recognized rule of international law that civilians must not be made the object of attack directed exclusively against them.”¹⁶³ This is merely a reiteration of the customary rule that non-combatants are not to be made the object of a direct attack. Although it must be admitted that a belligerent can easily evade this rule by alleging the existence of some military objective, no matter how minor, yet a reasonable interpretation of the rule ought to result in the exercise of some restraint. Thus, a biological warfare attack made with the purpose of infecting the civilian population would be illegal because of violating this rule of customary international law.¹⁶⁴

However, such an attack directed against enemy soldiers with infection of the civilian population occurring as an incidental

¹⁶¹ Lauterpacht, *The Problem of the Revision of the Law of War*, 29 BRIT. YB. INT'L L. 360, 364-365 (1952). Another writer, now a judge on the World Court, says: “The experience of World War II suggests that, so far as general aerial bombardment is concerned, attempts to define objectives in terms of their military use or by the old test of ‘fortified’ places will not be continued, and that the indiscriminate killing of civilians in a state that has resorted to force in violation of the law, and against which international enforcement measures are taken, must be anticipated. It is erroneous to deduce from this conclusion, as is sometimes done, that the old distinction between civilians and military personnel has been abandoned.” JESSUP, A MODERN LAW OF NATIONS: AN INTRODUCTION 215 (1948).

¹⁶² U.S. DEP'T OF ARMY, PAMPHLET NO. 27-1, *op. cit. supra* note 65, at 24-196.

¹⁶³ FM 27-10, at 16.

¹⁶⁴ The majority of text writers would *not* exempt from the protection of this rule the civilian workers in war industry. Two exceptions are STONE, *op. cit. supra* note 117, at 628-629, and J. M. Spaight, who stated: “International law should move with the times and admit, for the good of the rest, an exception to the inviolability of non-combatants by classifying armaments workers as *quasi-combatants*.” SPAICHT, *Non-Combatants and Air Attack*, 9 AIR L. REV. 375-376 (1939).

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result would be considered legal in the same manner as is the case now in land or aerial bombardment of military objectives, especially if a non-epidemic agent were employed. However, if it were possible by covert means during non-working hours to infect a war plant with a non-epidemic disease and to warn the civilian workers of the danger to be encountered by entering the plant, this ought not to be considered a direct attack on the civilian population.

3. *The Right of Neutrals.*

Through the 19th Century, the right of neutral States to be immune from direct hostile action of belligerents was generally recognized. Even though neutral rights on the high seas were virtually wiped out by the practice of unrestricted submarine warfare during the two world wars,¹⁶⁵ belligerents continued to respect such neutral rights as the inviolability of neutral territory. Although questions have now been raised about the right of a State to remain neutral during a United Nations armed action against an "illegal aggressor,"¹⁶⁶ and while some States may frown upon the right of other States to remain "neutral" in conflicts which are to a major extent ideological in nature, it appears that despite the erosion of neutral rights by the practice of two world wars it is still acknowledged that States not parties to a conflict have *some* rights as neutrals. Therefore, in the absence of an established rule eliminating the right of a State to choose neutrality, a biological warfare attack directed at a neutral State would be illegal.

However, a difficult question is posed by the possibility of a neutral State's being damaged through spreading of an epidemic from a belligerent State's being attacked by biological warfare. The problem is similar to that presented by the accumulation of dangerous levels of nuclear fallout in the atmosphere as a result of nuclear weapon attacks on belligerents.¹⁶⁷ The best answer seems to be that the judgment would have to be based on the degree of anticipated risk to the neutral State and the criterion of proportionality used to weigh the military advantage of the attack against the possible damage to the neutral State.

¹⁶⁵ See TUCKER, *op. cit. supra* note 144, at 181-195.

¹⁶⁶ See *id.* at 171-180; 2 OPPENHEIM, INTERNATIONAL LAW 645-652 (7th ed., Lauterpacht ed. 1952).

¹⁶⁷ For a discussion of neutral rights in connection with nuclear warfare, see O'Brien, *supra* note 159, at 95-98.

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4. “Dictates of the Public Conscience.”

The “de Martens clause” of the Preamble to Hague Convention No. IV of 1907 reminds nations that above and beyond specific limitations imposed by the laws of war all States **are** obliged to exercise such other restraint as might be dictated by general considerations of humanity :

Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from *the usages established among civilized peoples, from the laws of humanity, and from the dictates of the public conscience.*¹⁶⁸

Does biological warfare in fact, in all its forms, violate “the laws of humanity?” The fact is that objectively, from the standpoint of physical effects, some biological warfare agents would be more humane, would cause less suffering, less death, less permanent incapacitation or maiming or disfiguration — and less damage to civilian homes and factories and other private property— than other now accepted means of warfare. In other words, some biological warfare agents would be more “humane” than certain other weapons now regarded **as** completely “legal.”¹⁶⁹

Would the “laws of humanity” be violated by the use of biological warfare to destroy food crops? A negative answer seems

¹⁶⁸ U.S. DEP'T OF ARMY, PAMPHLET NO. 27-1, *op. cit. supra* note 65, at 5-6. [Emphasis added.] Lest it be thought that the philosophy expressed in the “de Martens clause” is a “dead letter” under modern conditions of warfare, it should be noted that the idea that much can still be done to ameliorate the lot of combatants and noncombatants during wartime is reflected strongly in the four Geneva Conventions of August 12, 1949. See *id.* at 24-194.

¹⁶⁹ One writer has said: “To me there is something inconsistent in singling out gases, chemicals, bacteria, and atoms and putting them outside the pale of international law, while other means of destruction accounted for some 40,000,000 human beings dead and wounded in 1939-45.” ENOCK, *THIS WAR BUSINESS* 96 (1951).

The former Commanding General of the U.S. Army's Chemical Corps Research and Development Command has said: “It can be argued that the *only* known hope for relatively humane warfare in the future lies in the chemical and biological weapons. . . . There are gases and biological agents which make it possible to *temporarily* incapacitate the enemy, with no after-effects, or to reduce his food supply without indiscriminate killing and maiming. War will never be less than horrible but chemical and biological warfare offer at least some small hope of carrying it on without unnecessarily destroying large numbers of troops, their families, and their cities. . . . There is no need to *increase* its horrors by prohibiting the use of weapons which could mean shorter fighting and less death.” Rothchild, *Germs and Gas: The Weapons Nobody Dares Talk About*, Harper's Magazine, June 1959, p. 29.

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proper in view of the accepted legality of complete blockades, scorched earth policies, and sieges.¹⁷⁰

What are "the dictates of the public conscience" with reference to biological warfare? Likely places to seek the answer are public opinion and the statement of public officials.

Although the 1925 Geneva Protocol described poison gas as "justly condemned by the general opinion of the civilized world," apparently the parties to the Protocol did not consider that condemnation as sufficiently strong to outlaw poison gas ipso facto, inasmuch as the purpose of the treaty was to have the parties "accept this prohibition" and to "agree to extend this prohibition to the use of bacteriological methods of warfare."¹⁷¹ Moreover, in filing reservations restricting the benefits of the pact to States parties to the Protocol it would appear that at that time those who accepted the treaty did not consider bacteriological warfare as violating the dictates of the public conscience to the extent that it would be illegal independently of the treaty obligation.

Since World War II various international associations have condemned bacteriological warfare, usually in strong terms.¹⁷² However, they are usually influenced by the thought of the more violent forms of BW. Moreover, they do not bear the heavy responsibility of providing for military defense and security, whereas military utility is a factor which should be considered in making a realistic and balanced appraisal of any weapon.

Statements of the leaders of various nations express from time to time an aversion to biological warfare. However, a realistic

¹⁷⁰ "The distinction [between civilians and military personnel] never did exist when a city was under siege, in the sense that the starvation of civilians and their destruction by gunfire was not a violation of the rules of war." JESSUP, *A MODERN LAW OF NATIONS: AN INTRODUCTION* 215 (1948).

"An armed force besieging a town may . . . cut off the river which supplies drinking water to the besieged. . . . Further, should the commander of a besieged place expel the non-combatants, in order to lessen the number of those who consume his store of provisions, the besieging force need not allow them to pass through its lines, but may drive them back." 2 OPPENHEIM, *op. cit. supra* note 165, at 326.

¹⁷¹ League of Nations Document A.13.1925.IX., at 77.

¹⁷² *E.g.*, the International Cytological Society (1947) protested against bacteriological warfare. Sack, *ABC—Atomic, Biological, Chemical Warfare in International Law*, 10 *LAW. GUILD REV.* 161, 167 n. 53 (1950). The Fourth International Congress of Microbiology. See *The New York Times*, July 27, 1947, p. 12, col. 1. The Medical Society of New Jersey. See *id.*, April 30, 1948, p. 46, col. 2. The International Red Cross. See *id.*, August 31, 1948, p. 11, col. 2. The International Red Cross Board of Governors. See *id.*, May 29, 1954, p. 2, col. 4. World Medical Association. See *id.*, October 2, 1954, p. 2, col. 7. See also, THE INTERNATIONAL COMMITTEE OF THE RED CROSS, *DRAFT RULES FOR THE LIMITATION OF THE DANGERS INCURRED BY THE CIVILIAN POPULATION IN TIME OF WAR* 12 (1956).

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view is that some statements of public officials in this regard are occasioned as much by an eye to propaganda or world public opinion as by repugnance to all forms of BW or by a belief that all forms would violate international law. It is with that caution in mind that many statements in the United Nations must be evaluated. Some of the statements of aversion to biological warfare reveal, when read closely, that the speaker is not implying a belief that biological warfare is prohibited by international law but rather that mankind should strive to eliminate it along with other devastating "legal" methods of warfare, as well as war itself.¹⁷³

A 1952 resolution of the United Nations General Assembly instructed the U.N. Disarmament Commission to strive "for the elimination of all major weapons adaptable to mass destruction."¹⁷⁴ In later debates in the U.N., the representatives of many nations expressed strong aversion to "weapons of mass destruction" and frequently included biological warfare, without qualification, in that classification. However, the definition of "weapon of mass-destruction" approved by the U.N. Security Council reads :

Weapons of mass-destruction should be defined to include atomic explosive weapons, radioactive material weapons, *lethal* chemical and biological weapons.¹⁷⁵ [Emphasis added.]

Thus, even were one to consider indicative of world public opinion and of "the dictates of public conscience" the 1946 unanimous pledge of all members of the U.N. General Assembly to eliminate all weapons of mass destruction, not all biological warfare agents would thereby be prohibited, inasmuch as some are not "lethal."

It should also be kept in mind that public opinion can change, and that it is sometimes formed by propaganda or misled by mis-

¹⁷³ For example, the United States representative to the Disarmament Commission said that the U.S. wished to reduce armaments and to eliminate effectively and with foolproof safeguards all instruments of mass destruction, including mass armies, atomic warfare and germ warfare. UNDC/OR, Special Supplement No. 1 Second Report of the Disarmament Commission, at 6.

¹⁷⁴ General Assembly Resolution 502(VI).

¹⁷⁵ UNSC/OR, 2d Year, Document S/c3, August 13, 1948.

¹⁷⁶ For example, an advisory committee of the U.S. delegation to the 1922 Washington Conference said that the "American representatives would not be doing their duty in expressing the conscience of the American people were they to fail in insisting upon the total abolition of chemical warfare." ROYSE, AERIAL BOMBARDMENT AND THE INTERNATIONAL REGULATION OF WARFARE 218 (1928). Moreover, the American delegation to the 1925 Geneva Conference accepted such a prohibition. Yet in 1926 the U.S. Senate rejected such a ban. During that debate, one of the senators said that the 1922 Washington Treaty prohibition had occurred because "there was much of hysteria and much of misinformation concerning chemical warfare." 68 CONG. REC. 144 (1926).

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The possible influence of "general principles of law" upon biological warfare might also be raised in terms of morality, ethics, or natural law. International morality¹⁷⁷ and ethics¹⁷⁸ are substantially reflected in the state of international law. As far as the natural law is concerned, Pope Pius XII, in speaking of ABC warfare, stated that such weapons could be employed legitimately only when indispensable in self-defense against a grave injustice and when the damage wrought remained within the bounds of proportionality :

There can be no doubt, especially in view of the horrors and immense suffering caused by modern war, that to unleash it without a just cause (that is to say if it has not been forced upon one by an evident and extremely grave injustice that in no way can be avoided) would constitute a crime worthy of extremely severe national and international sanctions.

The question of the legitimacy of atomic, bacteriological and chemical war can be posed equally as a matter of principle, except when it must be judged indispensable to defend oneself in the circumstances indicated.

Even then, however, one must try by every possible means to avoid it through international understanding or else by placing very clear and stringent limits upon its use so that its effects may not exceed the strict exigencies of defense.

When, however, this kind of war escapes completely from human control, its use must be rejected as immoral. In this case, no longer would it be a case of defense against injustice or of necessary safeguarding the legitimate possession but of pure and simple annihilation of all human life within the range of action. This is not permitted for any reason whatsoever.¹⁷⁹

Under this application of natural law, there are limits beyond which a State could not go in the use of biological warfare, even for the purpose of preserving its existence as an independent State.

There is sometimes difficulty in applying the natural law to a particular set of circumstances. However, an important guide is furnished by the principle of proportionality.¹⁸⁰ That is, simply, the means must be proportionate to the end.

¹⁷⁷ For an interesting series of essays, see *MORALITY AND MODERN WARFARE: THE STATE OF THE QUESTION* (Nagle ed. 1960).

¹⁷⁸ See, e.g., McKenna, *Ethics and War: A Catholic View*, 54 *AM. POL. SCI. REV.* 647-658 (1960).

¹⁷⁹ Address to doctors from 52 nations attending the Congress of the World Medical Association meeting in Rome, *The New York Times*, October 1, 1954, p. 5, col. 1.

¹⁸⁰ For discussions of the principle of proportionality, see O'Brien, *supra* note 70, at 148-149; O'Brien, *supra* note 159, at 48-58, 69-82; McDougal and Feliciano, *LAW AND MINIMUM WORLD PUBLIC ORDER: THE LEGAL REGULATION OF INTERNATIONAL COERCION* 241-244 (1961).

The U.S. Army field manual, *The Law of Land Warfare*, states: "The law

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Not all forms of biological warfare would be *per se* disproportionate to any military purpose. Some biological agents would cause less suffering and have less permanent effects than certain other weapons now accepted as legal. Therefore, it would be illogical to consider the former as disproportionate and the latter not.

In summary, although there have been many expressions of aversion to biological warfare, a review of the background of some of those statements and a comparison of the effects of the wide range of biological warfare agents with those of “legal” weapons reveals that all biological warfare would not violate “the dictates of the public conscience.”

5. Summary.

The foregoing examination of state practice and of customary rules of international law reveals that international custom has not established an obligation to refrain from all forms of biological warfare. It would not have been necessary to “extend” the poison gas prohibition to bacteriological warfare by means of the Geneva Protocol¹⁸¹—nor would reservations restricting the benefits of the pact to other States party to it serve any purpose if the States who fashioned and accepted the Protocol had been of the opinion that a customary obligation prohibiting bacteriological warfare already existed in 1925. Moreover, examination of the practice of States from 1925 until the present time shows that no customary rule in that respect has been established since then.

C. JUDICIAL DECISIONS

Article 38 of the Statute of the International Court of Justice directs the Court to make use of judicial decisions “as subsidiary means for the determination of rules of law.”¹⁸²

However, there has been only one¹⁸³ judicial decision with reference to an alleged violation of international law by the use of

of war places limits on the exercise of a belligerent’s power . . . and requires that belligerents refrain from employing any kind or degree of violence which is not actually necessary for military purposes.” FM 27-10, at 3.

¹⁸¹ *Supra*, p. 50.

¹⁸² The Statute provides that such decisions, including decisions of the ICJ itself, have no “binding force” as precedents.

¹⁸³ Testimony offered at the Nuremberg tribunals did not sustain charges there regarding German use of bacteriological warfare during World War II, with the result that the judges made no ruling on the legality of bacteriological warfare. In the case of the U.S. Military Tribunal, the judges placed emphasis on the illegality of the use of prisoners for experimental purposes rather than on the question of the legality of bacteriological warfare as such. See 11 TRIAL OF WAR CRIMINALS, *op. cit.* supra note 141, at 494-95.

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biological warfare. Even though Japan had not ratified the 1925 Geneva Protocol, a Soviet Military Tribunal in Khabarovsk in December 1949 convicted and sentenced to prison terms of up to twenty-five years twelve former Japanese Army officers who had pleaded guilty to charges of having prepared and used on repeated occasions bacterial weapons—in 1939 against the Mongolian People's Republic and in the 1940–1942 period against China.¹⁸⁴

The fact that only one decision has been rendered—by a national court against enemy lower echelon officers—and that the trial could be regarded as having political overtones and the charges as questionable¹⁸⁵ eliminates this one of the usual criteria for the existence of a binding legal rule.

D. TEXT WRITERS

Article 38 of the Statute of the International Court of Justice instructs the Court to consult “the teachings of the most highly qualified publicists of the various nations as subsidiary means for the determination of rules of law.”

Prior to the end of World War II, most text writers either made no reference at all to biological warfare (*e.g.*, Garner and Baty), or limited themselves to a mere mention of the prohibition of bacteriological warfare by the 1925 Geneva Protocol (*e.g.*, McNair,¹⁸⁶ Lauterpacht,¹⁸⁷ and Hackworth¹⁸⁸) and the prohibition

¹⁸⁴ The defendants were accused of having used typhoid, paratyphoid, cholera, anthrax, and plague. See 2 OPPENHEIM, *op. cit. supra* note 165, at 343n; MATERIALS ON THE TRIAL OF FORMER SERVICEMEN OF THE JAPANESE ARMY CHARGED WITH MANUFACTURING, AND EMPLOYING BACTERIOLOGICAL WEAPONS (Foreign Languages Publishing House (Moscow) 1950); The New York Times, December 25, 1949, p. 15, col. 2.

United States officials were of the belief that the Soviet charges were merely a smokescreen to obscure the fate of Japanese prisoners of war still held then by the Russians. See The New York Times, December 16, 1950, p. 2, col. 4.

¹⁸⁵ In 1950, the Soviet Government proposed the appointment of a special international military court to try, on these and similar charges, the Emperor of Japan and a number of Japanese generals. 2 OPPENHEIM, *op. cit. supra* note 165, at 343n.

¹⁸⁶ See OPPENHEIM, INTERNATIONAL LAW: A TREATISE 238 (4th ed., McNair ed. 1926). McNair added a footnote: “The scientific terms are not so comprehensive as they might have been, for there are (it is believed) several deadly infectious diseases capable of artificial dissemination, which are not caused by bacteria” (*Id.* at 238n.)

¹⁸⁷ See 2 OPPENHEIM, INTERNATIONAL LAW: A TREATISE 274–275 (6th ed. rev., Lauterpacht ed. 1944).

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proposed by the 1930 Disarmament Draft Convention (*e.g.*, Lauterpacht¹⁸⁹ and Hackworth¹⁹⁰). Hyde made no specific reference to bacteriological warfare beyond quoting the 1925 Geneva Protocol.¹⁹¹ However, he did express doubt concerning the effectiveness of the Protocol as a restraint on the use of gas warfare.¹⁹² Therefore, it seems logical to assume that he would have similar doubts regarding the effectiveness of the Protocol in preventing the use of biological warfare.

Even since the end of World War II, some text writers (*e.g.*, Kelsen and Scelle) have not included in their treatises any mention whatsoever of biological warfare. Others in the post-war period have discussed the subject as follows:¹⁹³

1. *Some Writers Regard Biological Warfare As Illegal for All.*

Castren reasons that :

The so-called minimum standard of warfare . . . means that certain especially brutal methods of fighting, the dangers of which may be unpredictable in extent, for example, the use of poisonous gas and bacteriological warfare, are prohibited *if* they are condemned by general opinion at the time.¹⁹⁴ . . . At the Geneva Disarmament Conference it was maintained that the spreading of dangerous bacteria was to be absolutely condemned in the general interest of humanity, either as a method of warfare or as a means of reprisal. The opposition to the use of poisonous gases was not equally strong.¹⁹⁵

As gas warfare behind the lines causes disproportionately large suffering to the civilian population as compared with its military advantages, the use of gas should, in principle, be entirely prohibited there. This is

¹⁸⁸ See 6 HACKWORTH, DIGEST OF INTERNATIONAL LAW 270-271 (1943). However, Hackworth also mentioned (*id.* at 260) that the 1940 edition of the U.S. Army's field manual on the *Rules of Land Warfare*, in discussing the prohibition of "poison and poisoned weapons" by Article XXIII(a) of the Hague Regulations, stated (page 8) that "this prohibition extends to the use of means calculated to spread contagious diseases." It is interesting to note that this sentence does not appear in the 1956 edition of the U.S. Army's manual. See FM 27-10, at 18.

¹⁸⁹ See 2 OPPENHEIM, *op. cit. supra* note 186, at 274-275.

¹⁹⁰ See 6 HACKWORTH, *op. cit. supra* note 187, at 271.

¹⁹¹ See 3 HYDE, INTERNATIONAL LAW: CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES 1821 (2d rev. ed. 1945).

¹⁹² It was his opinion that a "belligerent power will endeavor to make the best possible use of a relative military advantage and to be contemptuous of the dictates of humanity when they appear to frustrate a means of attaining an early and decisive victory." He thought that only its indecisiveness as a weapon or the fear of retaliation would deter the use of chemical warfare. *Id.* at 1822.

¹⁹³ The quotation in each case is taken from the text writer's latest edition, because it must be assumed to be his position as of that date, even though the text is identical with that of earlier editions.

¹⁹⁴ Emphasis added. This is a big "if."

¹⁹⁵ CASTREN, THE PRESENT LAW OF WAR AND NEUTRALITY 60, 71 (1954).

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also and with even greater reason true of *bacteriological warfare*. Here, however, we must **go** still further and prohibit the use of such methods of destruction entirely and in all theaters of war because it is difficult to protect civilians against infection. General opinion seems to condemn bacteriological warfare even more severely than the use of gas. Some authors have pointed out that the use of bacteria must be held to be a form of treachery and therefore prohibited while others compare it to the use of poison or even assassination.¹⁹⁶

Durdenevskii and *Shevchenko*, two Russian authors, rely upon the deMartens clause to substantiate their conclusion that

In the deMartens clause were expressed the demands of the public conscience which played a great role in the formulation of juridical prohibition of chemical and bacteriological weapons.¹⁹⁷

Evgenyev, another Soviet writer, states that during the Korean War "American imperialists . . . used the vilest and most abject means of mass destruction of human beings: the bacteriological weapon."¹⁹⁸

Kozhevnikov, also a Soviet writer, concludes that the Geneva Protocol is declaratory of international law, merely codifying the prohibition which would emanate from traditional limitations on the use of armed force.¹⁹⁹

Greenspan, almost alone among the American international lawyers, sees a customary prohibition against bacteriological warfare. Referring to the discussion which occurred at the time of the Communist charges of U.S. use of bacteriological warfare during the Korean War, he says:

Obviously, quite apart from treaty obligations, bacteriological warfare is regarded as a disgraceful and impermissible weapon, whose proven use would bring down on the user the merited obloquy of mankind.²⁰⁰

Sauer, a German authority, says:

Certainly international law does not give the right to a state to initiate the use of bacteriological, chemical, or atomic weapons against an aggressor who makes use only of traditional weapons.²⁰¹

¹⁹⁶ *Id.* at 195.

¹⁹⁷ *Durdenevskii* and *Shevchenko*, *Nesovmestimost Ispolzovaniya Atomnovo Orushija s Mormami Mezhdunarodnovo Prava*, SOVETSKOYE GOSUDARSTVO I PRAVO [*The Incompatibility of the Use of Atomic Weapons with the Norms of International Law*], 5 SOVIET STATE AND LAW 41 (1955)1 (translation supplied).

¹⁹⁸ *Evgenyev*, *Subjects of Law, Sovereignty and Non-Interference in International Law*, SOVETSKOYE GOSUDARSTVO I PRAVO (March 1955), at 83, as quoted in *Kulski*, *The Soviet Interpretation of International Law*, 49 AM. J. INT'L L. 626 (1966).

¹⁹⁹ MEZHDUNARODNOYE PRAVO [INTERNATIONAL LAW] 412 (*Kozhevnikov ed.* 1957).

²⁰⁰ GREENSPAN, *THE MODERN LAW OF LAND WARFARE* 358 (1969).

²⁰¹ SAUER, *GRUNDLHRE DES VOLKERRECHTS* 257 (1966) (translation supplied).

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However, he does not state why all states are bound by such a prohibition, but merely makes reference to the page of Verdross' book in which the latter listed bacteriological warfare under "forbidden weapons" while citing the Geneva Protocol without discussing its force with reference to States not parties to the treaty.²⁰²

Schwarzenberger, a noted British writer, concludes that :

The prohibitions of chemical and bacteriological warfare contained in the [1925 Geneva] Protocol must be taken to be merely declaratory of international customary law and equally binding on all states. It, then, becomes irrelevant whether any particular State is a party to the Geneva Protocol of 1925.²⁰³

He reaches this conclusion by assimilating bacteriological warfare to "poison," defined as any substance that "when introduced into, or absorbed by, a living organism destroys or injures health."²⁰⁴

2. *Some Writers Doubt a Universal Ban on Biological Warfare.*

Fenwick merely mentions that the failure of the United States and Japan to ratify the 1925 Geneva Protocol "made it impossible for other states to rely upon it." The tenor of his discussion regarding gas warfare, giving the impression that he doubts that there is a universal prohibition, can be inferred to apply also to biological warfare.²⁰⁵

Jessup reasons that "There are still limits which a modern law of nations should impose on man's inhumanity to man. International forces should be forbidden to use poison gas or bacteriological warfare." He mentions "bacteriological weapons" as if they are distinct from "poisoned weapons" and the "poisoning of wells." He does not make a definite statement, but his ambiguous

²⁰² *Zbid.*

²⁰³ SCHWARZENBERGER, *THE LEGALITY OF NUCLEAR WEAPONS* 38 (1958).

²⁰⁴ *Id.* at 27. In his earlier general treatise, Schwarzenberger confined himself to merely mentioning that the Geneva Protocol outlawed the use of bacteriological warfare. SCHWARZENBERGER, *A MANUAL OF INTERNATIONAL LAW* 85 (3d ed. 1952).

It is interesting to note that he suggested that all "limitations apply only in warfare between so-called civilized nations who can be expected to reciprocate. In wars with nations or tribes outside the pale of international law, commanders have to use their discretion and set themselves such limitations as their own sense of justice and humanity may dictate to them in the particular circumstances of the case." (*Id.* at 85-86.)

²⁰⁵ See FENWICK, *INTERNATIONAL LAW* 559 (3d ed. 1952). It should be noted that Fenwick has expressed the view that the laws of war are no longer effective restraints on the actions of belligerents and that whatever weapons are available will be used. See Fenwick, *The Progress of International Law During the Past Forty Years*, 2 *THE ACADEMY OF INTERNATIONAL LAW, RECUEIL DES COURS*, 1951, at 60-64 (1952).

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phrasing could be interpreted to indicate that he does not think there is a universally binding rule of international law prohibiting bacteriological warfare.²⁰⁶

Kunz says :

It is obvious that a restriction or prohibition of chemical, bacteriological, and atomic war is only possible by international agreement to which at least all militarily important states are parties. Negotiations for such agreement have been under way since the end of World War II, but, in a world which is lacking confidence, have not yet led to positive results.²⁰⁷

McDougal and *Feliciano*, in discussing the suggestion that the Geneva Protocol prohibition on bacteriological warfare is now declaratory of customary law, conclude that :

The derivations from the Hague Regulations rule forbidding the use of poison and poisoned arms relied upon in making this suggestion are not . . . wholly free from difficulties and it remains controversial whether a general prescription has emerged that is operative not only as against the forty-odd nations which have ratified the Protocol but also as against those which have not, such as the United States.²⁰⁸

They suggest that as far as the wording of the Protocol is concerned, "the broad range of differing possible specific measures designated by a single undifferentiated term, the employment of 'bacteriological methods of warfare'," may make important in the future the "projection of a more discriminatingly worded prohibition."²⁰⁹

Stone states :

Unless weight is placed on the analogy of the "contamination" of water supply prohibited by Article 23 of the Hague Regulations, or the reference in the Washington Submarine and Poison Gas Convention to liquids "analogous to asphyxiating, poisonous, or other gases," the first treaty restriction on bacteriological warfare is to be found in the Geneva Gas Protocol. The very text of this Protocol, purporting at it does to "extend" the gas warfare prohibition to bacteriological warfare, seems to admit that no such restriction was to be found in customary international law; a fact in any case clear from the comparatively modern development of the science of bacteriology. Nor is there as yet a sufficient line of treaty undertakings to suggest the growth of any such rule. Its scope therefore must be limited to those states who are parties to the Gas Protocol, within the limits of reciprocity and the like there laid down.

Since, moreover, the United States is not a party to the Geneva Gas Protocol, and it is unlikely that the State will be neutral in any major war, it is apparent that whether the prohibition of bacteriological war-

²⁰⁶ See JESSUP, *A MODERN LAW OF NATIONS: AN INTRODUCTION* 215-216 (1948).

²⁰⁷ Kunz, *The New U.S. Army Field Manual on the Law of Land Warfare*, 51 AM. J. INT'L L. 388, 396 (1957).

²⁰⁸ McDougal and Feliciano, *op. cit. supra* note 179, at 637.

²⁰⁹ *Id.* at 639-640.

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fare operates in such a war will depend upon the willingness of that State to accept voluntarily the self-denying ordinance of the Protocol.²¹⁰

Stone adds :

And since the United States must rank very high in its degree of preparedness for this as yet untried method of warfare, its future must be regarded as still problematical. And this is quite apart from the reciprocity, and the liberty of retaliatory use, which is applicable here as to poison gas warfare.²¹¹

Tucker reasons that:

Uncertainty must be expressed . . . over the existence today of a customary rule prohibiting the use of bacteriological weapons. . . . Whereas there is in the case of gas an impressive practice of states pointing toward the unlawful character of the resort to gas warfare, a similar practice does not yet exist in the case of bacteriological weapons. It does seem reasonably clear, though, that the present tendency with respect to bacteriological warfare is moving in a direction similar to that taken earlier with respect to gas warfare.²¹²

De Visscher, attempting to take a realistic view, states that modern war now knows “no restriction on means of destruction.” Although he welcomes an official statement in 1954 by the five permanent members of the United Nations Security Council that they desired the absolute prohibition of all weapons of mass destruction, he says that only mutual confidence can bring such efforts to a successful conclusion. However, he nowhere mentions biological weapons specifically, and probably had nuclear weapons primarily in mind.²¹³

3. Summary.

The weight of the testimony of the above text writers does not appear to support a belief that biological warfare is prohibited by any universally binding rule of international law. Except for the Russian authors who take the position that bacteriological warfare is forbidden to all states,²¹⁴ only four of the writers cited are of the opinion that it is outlawed for all States. Other writers, in-

²¹⁰ STONE, *op. & supra* note 117, at 557. In a footnote, he says: “Since some Parties to the Protocol would certainly be Allies of the United States, it would, subject to observance by non-Parties, remain binding on belligerents who were Parties.” *Id.* at 557 n. 58.

²¹¹ *Id.* at 557.

²¹² TUCKER, *op. cit. supra* note 144, at 53n.

²¹³ See DE VISSCHER, *THEORY AND REALITY IN PUBLIC INTERNATIONAL LAW* 291–292 (Corbett trans. 1957). It should be noted that De Visscher expresses the view that time spent on the laws of war is wasted effort and, moreover, even dangerous by possibly creating false confidence about their effectiveness. *Id.* at 292.

²¹⁴ It should be kept in mind that the Russian authors must hew to the “official line,” whether that results from sincere conviction, or from policy or current propaganda needs.

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cluding some widely respected names, either confine themselves to a mention of the 1925 Geneva Protocol and the 1930 Disarmament Draft Convention with no statement regarding a universally binding rule, or they suggest that no prohibition is found in a universally binding treaty on bacteriological warfare or resulting from a customary rule. It is reasonable to assume that if those who are noncommittal believed that there is good reason to think such a rule exists, they would say so.

Therefore, with few exceptions text writers are, at best, doubtful that international law prohibits bacteriological warfare for all States.

III. SUMMARY AND CONCLUSIONS

A. *WHAT IS THE LAW?*

Basing judgment upon the foregoing analysis of the characteristics and effects of biological warfare agents and upon the application of the international law criteria of Article 38 of the Statute of the International Court of Justice, it may be concluded that the present status of biological warfare in international law is as follows :

(1) *All* forms of biological warfare are prohibited, subject to the usual consideration of reciprocity, between those forty-six States who have signed and ratified or who have acceded to the Geneva Protocol of 1925.

(2) *All* forms of biological warfare are not prohibited *per se* for States not parties to the Protocol. Large-scale BW research is so recent that there has not been time for the Geneva Protocol to become declaratory of international custom.

(3) *All* forms of biological warfare are not prohibited *per se* for States parties to the Protocol against States not parties to the Protocol.

(4) *All* States, whether or not parties to the Geneva Protocol, are forbidden to employ biological toxins—by the prohibition on the employment of poisons in Article 23 of the Annex to Hague Convention No. IV of 18 October 1907, which has been ruled declaratory of international law for all States.

The author recognizes that his opinion regarding biological toxins is at variance with the statement in the United States Army's field manual on *The Law of Land Warfare* that "the United States is not a party to any treaty, now in force, that prohibits or restricts the use in warfare . . . of bacteriological warfare." The United States is a party to the 1907 Hague Con-

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vention. Perhaps the statement was intended to refer only to treaties specifically prohibiting bacteriological warfare by name and only to disease-producing bacteria, not biological toxins as well.

In disputing the applicability of the 1907 Hague poison ban to biological toxins, it might be argued that the 1907 treaty writers did not envision the bacterial means of manufacturing poisons. However, if it was intended to prohibit as beyond legitimate military action the local poisoning of wells or of individuals, it seems evident that a much greater evil would be wrought by mass poisoning accomplished through dropping a deadly poison like botulinum toxin in a water reservoir or spreading it over a large area by aerosol means. Moreover, chemical or plant-produced poisons then available could be obtained much more easily than is the case now with the production of microbial toxins in usable form.

Although a microbial toxin is manufactured by bacterial action rather than by chemical or plant action, it is nonetheless a poison, and the damage to humans is caused by the poisonous action of the toxin itself rather than by a disease-infecting action of the bacteria which produced the toxin. It is for that reason that the writer is of the opinion that microbial toxins, such as botulinum toxin and staphylococcus toxin, are embraced by the 1907 Hague Convention ban on poisons.

(5) Although—except for this universal prohibition on biological toxins—the employment of biological warfare by States not parties to the Geneva Protocol or by States parties to the Protocol against non-party States is not prohibited per se, the legality of the use of BW in specific cases must be judged in light of the following considerations :

(a) The traditional distinction between combatants and non-combatants will require, just as in the use of any other weapon, that a biological warfare attack not be directed *exclusively* at non-combatants. The legality of permitting injury to occur to non-combatants while staging a biological warfare attack upon a military target will depend upon the proportionality of that damage to the importance of the military objective, and upon whether another sufficiently effective means of accomplishing the military purpose but with less damage to non-combatants is available.

(b) The traditional rights of neutrals require that they not be made the object of direct attack. However, the legality of causing secondary damage to neutrals, as in the case of non-

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combatants, must be decided in specific cases by applying the principle of proportionality.

(c) The prohibition of “unnecessary suffering” embodied in the 1907 Hague Convention requires that BW not be used merely for the purpose of causing suffering; that of two agents of equal military utility the one causing less suffering be employed; and that in preference to a biological agent a non-biological agent of equal military utility but causing less suffering be used—if such can be found, perhaps a painless psychochemical agent causing temporary incapacitation.

Under this heading would be considered not only the degree of pain, but also such things as the length of the period of suffering, the length of the period of incapacitation, and the possibility of permanent maiming or disfigurement.

(d) Even if the St. Petersburg principle prohibiting weapons making death inevitable were not considered a treaty obligation, normally the general principle of proportionality would forbid the use of any biological agent—if such there be—which would carry the likelihood of almost certain death.

(e) The employment of anti-crop and anti-animal biological agents for siege purposes would be lawful to the same extent as the use of land or sea blockade.

(6) The fear engendered in the general public and the repugnance expressed by public officials are not evidenced that biological warfare is prohibited by international law because it violates “the usages established among civilized peoples,” “the laws of humanity,” or “the dictates of the public conscience.” The fear of the general public results not only from its dread of the insidious and invisible, but partly also from many exaggerations of the effects of biological warfare in newspaper and magazine articles written in a sensational vein. In reality, the effects of some BW agents would cause far less suffering and fewer deaths and leave behind less permanent injury to man and damage to homes and factories than other weapons now accepted as “legal.” Moreover, the strong expressions of aversion to BW by public officials and representatives of States sometimes refer only to the more extreme forms, and at other times are made with the same intent as statements condemning other methods of warfare or war itself. In this respect, we need only compare with the subsequent practice of World War II the manner in which just a few years earlier many leaders deplored the unrestricted submarine warfare and aerial bombardment of World War I.

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B. WHAT SHOULD BE THE LAW?

The best course would appear to be to outlaw *all* biological warfare by an international convention accepted by all States. This could, of course, take the form of additional ratifications of, or accessions to, the 1925 Geneva Protocol, but it would probably be more effective to have a new treaty drawn specifically for that purpose, treating biological warfare separately from chemical warfare, and requiring each State by its signature and ratification of a new treaty to affirm and proclaim its position *now* in definite terms. However, the possibility of such a treaty appears remote indeed at present. Yet reasons for it are compelling. They may be listed as follows:

(1) The danger of “escalation” always exists. A State attacked by a relatively “humane” bacteriological agent might retaliate with a somewhat more virulent, although possible still “humane,” agent. Then would follow a series of alternating counter-reprisals with ever more powerful agents producing a “snowball” effect until emotions would drown out the voice of any moral restraints opposing the use of those agents which are, by their very nature, “immoral” or “illegal.”

(2) Owing to differences in natural immunities or dietary consequences, some peoples might be more likely to react with severe effects to a particular biological agent than would other peoples, so that the result would be far more serious damage than intended by the attacker.

(3) The disease generated might spread beyond the locality attacked to non-combatants in areas not under attack, or even to neutral countries.

(4) Even though an argument might be put forward that the use of biological warfare should not only be permitted but that the use of *certain* agents should be encouraged for “humane” reasons in place of other weapons, it should be kept in mind that the painless, temporarily incapacitating nerve gases or psychochemicals would produce much less suffering or discomfort, and could be more easily controlled with reference to the area covered and the prevention of spreading to non-combatants or to areas not subjected to the attack.

Despite the logic of these reasons, such a total prohibition is not possible at the present time. For one thing, history shows that nations are reluctant to deprive themselves of weapons which might prove militarily effective. Moreover, even if States restricted themselves entirely to research for licit medical purposes,

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much of the knowledge gained would be useful for waging biological warfare should such a course be undertaken at some future date.

Therefore, keeping in mind that in order for such a treaty to be accepted by all States it would have to seek its humanitarian objectives against the background of military requirements, the present law should be strengthened by attempting to draw up an acceptable new international treaty which would outlaw absolutely certain types of biological warfare, those which cause almost certain death, or permanent incapacitation or maiming, and perhaps some of the extremely painful or more epidemic. It would be well to spell out a prohibition of a biological warfare attack directed exclusively at non-combatants. The treaty should be so phrased as to make certain that the proscribed agents are not outlawed solely by the treaty itself, but that the pact is a formal acknowledgement by States that those agents, because of their specially harmful effects, are prohibited per se by the dictates of humanity.

In the meantime, this conception should be given practical application—and the chances for such a treaty enhanced—by being reflected in the tactical doctrine and training manuals and maneuvers of national armed forces. Moreover, it should be made clear in armed forces' manuals on the laws of war that, in the words of the U.S. Army's manual, "the law of war places limits on the exercise of a belligerent's power . . . and requires that belligerents refrain from employing any kind or degree of violence which is not actually necessary for military purposes and that they conduct hostilities with regard for the principles of humanity and chivalry. . . . The prohibitory effect of the law of war is not minimized by 'military necessity.' . . . The law of war is binding not only upon States as such but also upon individuals."²¹⁵

Moreover, just as military training endeavors to inculcate the principle of "economy of force" with reference to the use of manpower and supplies, so doctrine and instruction should stress the concept of proportionality and the use of less damaging or dangerous alternate means when sufficiently effective to accomplish a legitimate military objective.

Such a policy will help to defend the humanitarian interests of mankind from the onslaught of ideological and total war until, it is fervently hoped, the ultimate return of a more unified philosophical outlook in international society will make possible more mutual

²¹⁵ FM 27-10, at 3-4.

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trust between States and, by removing fears of **an** enforced change in “way of life” and assisted by strong political, non-legal pressures, will eventually bring States to regard **as firmly** prohibited weapons which threaten mankind with horrible suffering and utter devastation.

THE SOLDIER'S RIGHT TO A PRIVATE LIFE*

BY LIEUTENANT COLONEL ARTHUR A. MURPHY**

I. INTRODUCTION

Among officers and enlisted men generally, there is considerable disagreement on the extent to which military law and discipline permit a soldier' to have a private life. At one extreme stands the "old Army" archetype who quotes the maxim about a soldier being on duty twenty-four hours a day to justify command meddling in the most intimate affairs of the soldier. At the other pole is the disgruntled draftee who feels the soldier becomes a civilian when he takes off his uniform at the end of an eight-hour day. Of course, as all military lawyers know, neither of these simplistic views is correct. An Army career today demands some sacrifice, but not total submission to authority.

A number of decisions, textbooks, and articles have treated one or more aspects of the personal life of the serviceman.² None of them, however, has attempted to catalogue and correlate the many rights, privileges, and immunities which define the area of freedom of the typical officer or enlisted man in his ordinary, off-duty affairs.

In this article the author has two principal objectives. The first is descriptive, to present a survey of the law relating to the domestic affairs, business dealings, social life, and recreation of the soldier. Occasional digressions are made to explain the circumstances of military life and history which have led to the present law. The second objective is modestly evangelistic, to suggest that the particular rights, privileges, and immunities discussed should

* The opinions and conclusions presented herein are those of the author and do not necessarily represent the views of The Judge Advocate General's School or any other governmental agency.

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¹ The terms "soldier" and "serviceman" are used herein, unless the context shows otherwise, in a generic sense to mean any military member of the Army. They include officers, warrant officers, and female personnel as well as enlisted men. Although this article is addressed primarily to the Army, much of what is said applies to other services.

² See, e.g., CM 403928, *Jordan*, 30 CMR 424, *pet. denied*, 12 USCMA 727, 30 CMR 417 (1960); Quinn, *The United States Court of Military Appeals and Individual Rights in the Military Service*, 35 NOTRE DAME LAW, 491, 500-02 (1960).

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be regarded as manifestations of a single, more fundamental right, one which should be called "the soldier's right to a private life."³

II. BACKGROUND

A. SOURCES OF THE RIGHT TO A PRIVATE LIFE

There are a large number of loosely related rights, privileges, and immunities found chiefly in the *Uniform Code of Military Justice*, custom, Army regulations, and the decisions of military courts and agencies which might be said to be manifestations or constituents of the soldier's "right to a private life."

Two groups of articles from the *Uniform Code* figure in the decisions of military appellate courts and in the opinions of The Judge Advocate General defining the relationship between individual freedom and military power. In the first groups are articles 90, 91, and 92 which, in sum, call for the punishment of any person who disobeys a "lawful" command, order, or regulation. The other group consists of articles 133 and 134. Under article 133, an officer who engages in conduct "unbecoming an officer and a gentleman" is guilty of an offense. Under article 134, an officer or enlisted person who commits a disorder or neglect "to the prejudice of good order and discipline in the armed forces" or who engages in conduct "of a nature to bring discredit upon the armed forces" may be tried and punished. These articles are analogous to provisions found in all the Articles of War that antedated the *Uniform Code*, except for the proscription against conduct likely to bring discredit upon the service; this particular provision first appeared in 1916.⁴ The language of the cited articles and their predecessors is broad. There has been much room for judicial exposition in such words as "lawful," "unbecoming," "prejudicial," and "discreditable;"⁵ many of the rights connected with the serviceman's private life have been read into these protean terms.

If the concept of the right to a private life is to be fully understood, sources other than the *Uniform Code of Military Justice* must be considered. The soldier has, for example, substantial freedom to leave his organization when off-duty, a "right" based on

³ The basic right might also be termed a right to "freedom of action." See Quinn, *supra* note 2.

⁴ For text of the Articles of War, which preceded the *Uniform Code of Military Justice*, see 62 Stat. 604, 627-44 (1948); 41 Stat. 789 (1920); 39 Stat. 650 (1916); WINTHROP, *MILITARY LAW AND PRECEDENTS* 1478-537 (2d ed. 1896).

⁵ See Ackroyd, *The General Articles, Articles 133 and 134 of the Uniform Code of Military Justice*, 35 ST. JOHN'S L. REV. 264 (1961).

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regulations which is protected almost exclusively by administrative means. On the other hand, commanders at all levels may have recourse to sanctions besides the court-martial trials and nonjudicial type of punishment⁶ authorized under the *Uniform Code* through which they may limit the freedom of their subordinates. Regulations and custom may permit them to reduce a subordinate in grade or separate him from the service for deviant behavior which is not punishable under the *Code*.⁷

Rather surprisingly, the Constitution has not been a notable source of soldier rights in the areas we are considering. The tribunals and writers who have dealt with the question, in fact, have divided on whether any of the procedural and substantive rights guaranteed to citizens by the United States Constitution apply to servicemen.⁸ Even the Court of Military Appeals, created by Congress in 1951 as a court of last resort in cases arising under the *Uniform Code of Military Justice*, did not take a stand immediately. After its period of hesitation, however, the Court now seems committed to the position that a soldier does derive rights directly from the Constitution and that it has the duty to protect those rights against any infringement.⁹ In *United States v. Williamson*, Chief Judge Quinn expressed a broad charter for soldier rights: The serviceman "is entitled not only to the benefits of the Uniform Code of Military Justice, but to the safeguards of the Bill of Rights of the Constitution of the United States, and, as a human being is also entitled to the protection of both natural and divine law."¹⁰ The *Williamson* case, however, concerned the procedural rights of a person accused of crime, as do most of the cases in which a Constitutional issue has been explicitly met by the members of the

⁶ For minor offenses against the Code, commanders may, subject to certain conditions, impose punishment themselves. UNIFORM CODE OF MILITARY JUSTICE art. 15 [hereinafter cited as UCMJI].

⁷ See Army Regulation 635-105, 13 Dec. 1960 with Changes 4, 5, and 6; Army Regulation 635-209, 8 April 1959 with Changes 5, 6, and 7; para. 30, Army Regulation 624-200, 1 Nov. 1960 with Change 4.

⁸ See, e.g., *Burns v. Wilson*, 346 U.S. 137 (1953); WINTHROP, *op. cit. supra* note 4, at 2-4, 54-55, 605, 1015; Henderson, *Courts-Martial and the Constitution: The Original Understanding*, 71 HARV. L. REV. 293 (1957); Wiener, *Courts-Martial and the Bill of Rights: The Original Practice II*, 72 HARV. L. REV. 266 (1958); Wurfel, "Military Due Process: What Is It?" 6 VAND. L. REV. 251 (1953).

⁹ See, e.g., *United States v. Jacoby*, 11 USCMA 428, 29 CMR 244 (1960); *United States v. Voorhees*, 4 USCMA 509, 16 CMR 83 (1954); *United States v. Clay*, 1 USCMA 74, 1 CMR 74 (1951); Warren, *The Bill of Rights and the Military*, 37 N.Y.U.L. REV. 181 (1962).

¹⁰ 4 USCMA 320, 331; 15 CMR 320, 331 (1954) (dissenting opinion), See Quinn, *supra* note 2, for an unofficial statement of Judge Quinn's views.

Court." The Court has rarely found it necessary to refer to the Constitution when dealing with some aspect of the soldier's substantive right of a private life.¹²

B. UNDERLYING FACTORS

A great many diverse factors determine the balance between command power and individual liberty as it is expressed in the statutory law, Army regulations, customs, and interpretive decisions of a given period. The particular facets of the soldier's right to a private life, consequently, have not evolved according to any regular pattern. There has been no obvious historical progression either towards greater liberty or towards less liberty for officers and enlisted men. The soldier's relations with his creditors, for instance, are now subject to much less official control than between World Wars I and II, while restrictions are imposed on his freedom to marry which did not exist in the same period.

Two fundamental, and often contending, influences have been at work: the liberal democratic tradition and the professional military tradition.¹³ The exponents of the democratic tradition, heritors of the colonial mistrust of standing armies and of professional officer corps, have generally advocated equalization of the status of officers and enlisted men, and a discipline in which the rights, privileges, and immunities of the soldier approach those of a citizen in an ideal democracy.¹⁴ In modern times, the democratic traditionalists were most articulate and effective during World Wars I and II and the two post war periods when public and congressional attention was focused on the Army.¹⁵

¹¹ See, *e.g.*, *United States v. Jacoby*, 11 USCMA 428, 29 CMR 244 (1960); *United States v. Brown*, 7 USCMA 251, 22 CMR 41 (1956); *United States v. Williamson*, 4 USCMA 320, 15 CMR 320 (1954); *United States v. Swanson*, 3 USCMA 671, 14 CMR 89 (1954); *United States v. Sutton*, 3 USCMA 220, 11 CMR 220 (1953).

¹² See, *e.g.*, *United States v. Wilson*, 12 USCMA 165, 30 CMR 165 (1961); *United States v. Day*, 11 USCMA 549, 29 CMR 365 (1960); *United States v. Milldebrandt*, 8 USCMA 635, 25 CMR 139 (1958). But see, *United States v. Wheeler*, 12 USCMA 387, 30 CMR 387 (1961); *United States v. Wysong*, 9 USCMA 249, 26 CMR 29 (1958) (semble).

¹³ See HUNTINGTON, *THE SOLDIER AND THE STATE* 143, 193, 345-46 (1967); Rose, *The Social Structure of the Army*, 51 AM. J. OF SOCIOLOGY 361 (1946).

¹⁴ See WEIGLEY, *TOWARDS AN AMERICAN ARMY* 1-9, 20, 26-29, 34-35, 240-41 (1962); the Report of the Secretary of War's Board on Officer-Enlisted Man Relationships, May 27, 1946, reprinted in S. DOC. NO. 196, 79th Cong., 2d Sess. (1946) (the Doolittle Committee Report).

¹⁵ See the Report of the Secretary of War's Board on Officer-Enlisted Man Relationships, *supra* note 14; HUNTINGTON, *op. cit. supra* note 13, at 282-88, 460-61; White, *The Background of the Problem*, 35 ST. JOHN'S L. REV. 197 (1961).

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The "professional military tradition," a tradition largely derived from European armies and handed down within the officer and noncommissioned officer corps, probably had its greatest influence on the character of the Army between the Civil War and World War I, and in the years 1925 to 1940 when the Army was relatively isolated from civilian life.¹⁶ This tradition emphasizes the permanence, irrationality, and weakness of human nature. It stresses the supremacy of society over the individual and the importance of order and hierarchy. It exalts obedience and subordination of all personal interests as the highest virtues of military men.¹⁷ Its hallmark is domination of the individual tempered by a practical, paternalistic concern for his welfare.¹⁸ Fusion of the official and private spheres of its members' lives is a basic feature of the tradition.¹⁹

Many other forces, events, and conditions, some more or less related to the democratic and military traditions, have also contributed to a frequent reshaping of the soldier's right to a private life.²⁰ The nature of the wars in which we engaged or which our leaders and military theorists anticipated, progress in weapons, strategy and tactics, and the peacetime missions and style of life of the Army in garrison, on the frontier, and later in foreign lands, have all affected military discipline and soldier-freedom.²¹ Conscription, the size of our forces, and the origins of the Army's officers and enlisted men have also been important.²² There has been frequent interaction between the American civil society and its dependent military society. Changes in the social, moral, and legal norms of the larger society and in the management practices of civilian business have sometimes been reflected in the rights accorded the individual soldier.²³ Finally, the existence or absence of effective civilian legal controls over off-duty activities of servicemen has often been the crucial factor determining whether the

¹⁶ HUNTINGTON, *op. cit. supra* note 13, at 226-30.

¹⁷ *Id.* at 62-79.

¹⁸ JANOWITZ, *THE PROFESSIONAL SOLDIER* 38-46 (1960).

¹⁹ *Id.* at 177-78, 199.

²⁰ On factors which have determined the organization and character of the American Army, see generally WEIGLEY, *op. cit. supra* note 14.

²¹ See JANOWITZ, *op. cit. supra* note 18 at 15, 21-50, 64-74, 423; HUNTINGTON, *op. cit. supra* note 13, at 345-46; CROGHAN, *ARMY LIFE ON THE WESTERN FRONTIER: SELECTIONS FROM THE OFFICIAL REPORTS MADE BETWEEN 1826 AND 1945*, at 107-33 (Prucha ed. 1958).

²² See JANOWITZ, *op. cit. supra* note 18, at 79-101; HUNTINGTON, *op. cit. supra* note 13, at 37, 60-61.

²³ See JANOWITZ, *op. cit. supra* note 18, at 21-36, 233-49, 424. At times, the military has been repelled by particular standards or practices of civil life; the consequence has been reaction rather than assimilation.

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Army intervenes in particular matters or maintains a hands-off policy.²⁴

The democratic and military traditions and the other mentioned influences have shaped the Army's discipline and military order over a period of nearly 190 years. The result today is a complex kind of discipline and a rather "legalistic" military order. Management, persuasion, cooperation, and initiative have significant places in the modern discipline along with old-fashioned domination.²⁵ Army directives prescribing the mode of treating subordinates have proliferated. The number of lawyers in the Army, in relation to its size, and their influence as participants in the court-martial process, as drafters of regulations, and as advisors to commanders has increased greatly since World War II.²⁶ And the Court of Military Appeals has, since 1951, given added vitality to the rule of law in the Armed Forces.²⁷ Recognition of the dignity of the individual soldier and of his claim to personal freedom receives greater stress than ever in official philosophy.²⁸

All this does not necessarily mean that the scope of the soldier's right to a private life is larger than at anytime in our history. Official philosophy does not inevitably coincide with actual practice, nor does more law necessarily mean more freedom. The world and our military problems are more complex than they were in 1840 or 1940, at least they seem so. What it does mean is that today, more than ever before, the interests and aspirations of the individual soldier are likely to be assessed conscientiously whenever decisions are made which may affect his personal life and affairs.

²⁴ See WINTHROP, *op. cit. supra* note 4, at 1125; JAGA 1958/5147, 10 July 1958, 8 DIGEST OF OPINIONS: THE JUDGE ADVOCATES GENERAL OF THE ARMED FORCES 225 (1959) [hereinafter cited as DIG. OPS.].

²⁵ See JANOWITZ, *op. cit. supra* note 18, at 40-46, 66-68; U.S. DEPARTMENT OF DEFENSE, THE ARMED FORCES OFFICER (1950) (particularly 111-16, 124, 139-46); Wash. Post, Sept. 3, 1961, p. 1, col. 4 (techniques of modern psychology used in experiment at adding grasshoppers to soldiers' diet).

²⁶ See Fratcher, *History of the Judge Advocate General's Corps, United States Army*, 4 MIL. L. REV. 89 (1959). But see Davis and Wiley, *Military Legal Services Face Extinction*, Federal Bar News, May 1961, p. 127 (describes Army's current difficulties in recruiting and retaining lawyers).

²⁷ See Quinn, *The United States Court of Military Appeals and Military Due Process*, 35 ST. JOHN'S L. REV. 225 (1961); Walker and Niebank, *The Court of Military Appeals — Its History, Organization and Operation*, 6 VAND. L. REV. 228 (1953).

²⁸ See U.S. DEPARTMENT OF DEFENSE, THE ARMED FORCES OFFICER 142-43 (1950). JAGA 1954/9494 states, "It is the established policy of the Department of the Army to refrain from interfering in the personal and private affairs of members of the Army so long as their activities do not bring discredit upon the military service . . ." 4 DIG. OPS. 472 (1954).

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III. DOMESTIC AFFAIRS

A. MARRIAGE

The Army has a real interest in the marital status of its members. Marriage can make a man a more stable soldier or it can complicate his life to a point where he is useless to his organization. Furthermore, the demands of the **typical** married soldier nowadays are likely to be greater than those of the bachelor; he wants the Government to give him every possible opportunity to live with wife and children and to pay him commensurate with his family needs. Despite an observable connection between marriage and military efficiency, The Judge Advocate General early held that a commanding officer has no inherent legal authority to prohibit his subordinates from marrying.²⁹ Until recent years, the Army relied on indirect methods to affect the marital composition of its forces. Recruiting policies or low pay conventionally discouraged the peacetime enlistment and re-enlistment of married persons in the lower grades.³⁰

Since World War I, however, there has been direct official intercession in the matrimonial plans of certain groups. Nurses and the first members of the Woman's Army Auxiliary Corps were for a time forbidden to marry.³¹ Army regulations in 1939 required that enlisted men of the lower grades obtain the permission of their regimental commanders before marrying.³² There was no sanction for failure to obtain such approval, however, other than denial of the privilege of re-enlisting. Problems resulting from the presence of large numbers of soldiers overseas during and after World War II led to various department and local directives requiring that soldiers obtain official permission before wedding foreign

²⁹ Command VA2a, DIGEST OF OPINIONS OF THE JUDGE ADVOCATES GENERAL OF THE ARMY—1912, at 266 (1917) (Opinion rendered in 1876); During the nineteenth century soldiers in some European armies were either forbidden to marry or allowed to marry only with the consent of superiors. See FARRER, MILITARY MANNERS AND CUSTOMS 218-19 (1885).

³⁰ See, e.g., Art. XXXVI, para. 11, General Regulations for the Army of the United States, 1835; para. 930, Revised Regulations for the Army, 1861; para. 914, Regulations for the Army of the United States, 1889; paras. 852, 1412, Regulations for the Army of the United States, 1913 (corrected to April 15, 1917). But see, Art. 74, paras. 12, 13, General Regulations for the Army, 1821.

³¹ TREADWELL, THE WOMEN'S ARMY CORPS (THE UNITED STATES ARMY IN WORLD WAR II SERIES) 510 (1954). This work suggests the problems involved in fitting women into a discipline and legal order intended primarily for men (pages 497-514, 667-83).

³² Para. 14, Army Regulation 600-760, 10 April 1939.

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nationals;³³ marriage without permission was punishable as a violation of regulations. In some commands the directives were administered in a way which prevented or discouraged most marriages.³⁴

The only Department of Army regulations presently in force which restrict the right to marry are Army Regulations 600-240³⁵ and 608-61;³⁶ both concern marriages in foreign countries. The most important of these, Army Regulation 600-240, announces Department of Army policy and authorizes each major overseas area commander to regulate marriages within his command in consonance with that policy. A soldier desiring to marry in an overseas command must obtain written approval of the area commander or his delegate. Before approval an inquiry into the health and character of the prospective bride and the financial means of the soldier must be made.³⁷ Approval is to be given in all cases where military personnel have complied with local regulations, provided examination does not show that the intended spouse would probably be barred from entering the United States and provided the applicant has shown financial ability to prevent his spouse from becoming a public charge.³⁸ Parental consent is also required for persons under 21 years of age. Army Regulation 600-240 is avowedly paternalistic; a stated purpose is to protect both parties from an impetuous marriage.³⁹

The validity of directives requiring that soldiers obtain permission before marrying in foreign countries has been attacked in several cases. During World War II an Army Board of Review in *United States v. Radloff*⁴⁰ affirmed the conviction of a soldier charged with disobeying such a directive. The majority refused to question the legality of wartime regulations issued by an overseas commander or by the War Department on the grounds that they

³³ Authority for such directives is clearest in combat areas, occupied territory or other places where the Armed Forces exercise governmental powers over the civil populace. When our troops are present in a friendly foreign country, a jurisdictional basis for broad control of off-duty activities may be found in an agreement with the host country or in practical necessity. *United States v. Smith*, 9 USCMA 240, 26 CMR 20 (1958).

³⁴ See CM 393175, *Reese*, 22 CMR 612 (1956).

³⁵ 14 Oct. 1953 with Changes 2 and 3.

³⁶ 13 June 1963.

³⁷ In CM 393176, *Reese*, 22 CMR 612 (1956), the refusal of a commanding officer to allow a soldier, for lack of financial resources, to marry the mother of his illegitimate child was deplored by a Board of Review.

³⁸ Para. 4.

³⁹ Para. 7. Army Regulation 608-61 complements Army Regulation 600-240 and applies to soldiers stationed in the United States who wish to travel to a foreign country to marry an alien.

⁴⁰ CM ETO 567, *Radloff*, 2 BR (ETO) 143 (1943).

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infringed the Constitutional rights of the accused. The Court remarked that, in becoming a soldier, the accused necessarily surrendered some of the privileges and immunities belonging to him as a citizen. One Board member, in a concurring opinion, maintained, however, that a serviceman's right to marry is protected by the "due process" clause of the fifth amendment.⁴¹

The Court of Military Appeals in the 1958 case of *United States v. Nation*⁴² reversed the conviction of a sailor, punished under article 92, Uniform Code of *Military Justice*, for marrying without official permission contrary to a regulation of the Commander, U.S. Naval Forces, Philippines. The Court held the regulation illegal because it included an "arbitrary and unreasonable" requirement that the parties wait six months between submission of the application and receiving permission.

In the more recent case of *United States v. Wheeler*⁴³ the Court upheld a similar regulation of the same Naval commander which had been rewritten to eliminate the waiting period. The questioned directive called for compulsory counseling, medical certificates to show freedom from major diseases, and, in the case of minors, parental consent. The Court noted that activities of military personnel may have different consequences when they occur in foreign countries rather than in the United States. For example, if a soldier marries a woman with active tuberculosis in a land where medical treatment is not readily available, the health and welfare of other American personnel may be endangered.

The *Wheeler* decision is important for other reasons besides its rather narrow holding that a military commander may, at least in foreign areas, impose reasonable restrictions on the right of military personnel of his command to marry.⁴⁴ The Court, in disposing of the defendant's argument that the regulation violated his constitutional rights including his freedom of religion, takes for granted the existence of such rights. The *Wheeler* case, together with *Nation*, illustrates the current approach to situations in which the "lawfulness" of a regulation or order is questioned as transgressing the personal interests of a serviceman. The court must be satisfied that the regulation or order is directly connected with the armed services and is reasonably necessary to promote some accepted military value, such as morale, discipline or efficiency. Reasonableness has now assumed unprecedented importance

⁴¹ *Id.* at 160-63.

⁴² 9 USCMA 724, 26 CMR 504 (1958).

⁴³ 12 USCMA 387, 30 CMR 387 (1961)

⁴⁴ *Id.* at 390; 30 CMR at 390.

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in military law as part of the test of "lawfulness."⁴⁵ Finally, Judge Ferguson's dissent in *Wheeler* may presage the recognition of extensive areas of private life unqualifiedly beyond military control. The dissenting judge would hold an order requiring a commander's permission to marry illegal on its face. "There is no holier state and certainly nothing more personal to an individual than his intent to embark on the matrimonial seas."⁴⁶

B. RESPONSIBILITY FOR BEHAVIOR OF FAMILY

In the traditional military community, family life was molded to the requirements of the profession. The wives and children of officers and noncommissioned officers shared their sense of calling and respect for authority. They were amenable to the suggestions of superiors and superiors were not reluctant to make suggestions.⁴⁷ This tradition has survived to some extent, particularly on Army posts and in overseas commands, despite the more independent character of today's Army family.⁴⁸

Officers and enlisted men are expected to see that their wives and children obey the law, pertinent regulations, and the more important customs of the service. Of course, this does not mean that the soldier's criminal and civil liability for the derelictions of his family is greater than that of the civilian husband and father.⁴⁹ Some commanders, however, consider a soldier's responsibility to be more than a moral one and will invoke other sanctions against him if his family includes a chronic offender.

A case which occurred on an installation in the United States is illustrative. The officer involved lived with his family, including a grown daughter, in government quarters. The officer was either

⁴⁵ See, e.g., *United States v. Wilson*, 4 CMR 311 (1952) (Army Board of Review); *United States v. Mellinger*, 60 BOARD OF REVIEW 199 (1946); WINTHROP, *op. cit. supra* note 4, at 887-91. See also Fratcher, *Presidential Power to Regulate Military Justice: A Critical Study of Decisions of the Court of Military Appeals*, 34 N.Y.U.L. REV. 861, 876-77, 888-90 (1959) for an argument that the Court of Military Appeals is exceeding its authority in questioning presidential and service regulations.

⁴⁶ 12 USCMA 387, 391; 30 CMR 387, 391. For a case later than *Wheeler*, involving similar facts and result, see *United States v. Smith*, 12 USCMA 564, 31 CMR 150 (1961).

⁴⁷ See JANOWITZ, *op. cit. supra* note 18, at 177-78, 187-90.

⁴⁸ See WAIMSLEY, *YOUR FUTURE IN THE ARMY* 114-15, 118-19, 126-27, 135-36 (1960). In addition to moral suasion, an Army commander does have some legal authority to control directly activities of military dependents when they are on an Army post or in an overseas command. Installation commanders exercise many of the powers of a mayor, city council, and landlord. See JAGA 1958/5147, 10 July 1958, 8 DIG. OPS. 225 (1959).

⁴⁹ Cf. C.M. 124889 (1919), DIGEST OF OPINIONS OF THE JUDGE ADVOCATE GENERAL OF THE ARMY, 1912-1940, at 286 (1942).

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unwilling or unable to control his daughter who, like Polly Peachum, was just a heap of carnal notions. The post commander turned to his judge advocate for advice on possible remedies. Among the steps considered, besides direct action against the daughter,⁵⁰ were evicting the officer and his family from their quarters⁶¹ and eliminating the officer himself from the service for inability to manage his personal **affairs**.⁵² Fortunately, there was no need for any such drastic and questionable measure. The young lady tired of Army life and resettled in a more propitious community.

C. TREATMENT AND SUPPORT OF DEPENDENTS

In the late 1800's, courts-martial were taking cognizance of charges alleging abuse and neglect of dependents. Officer liability was established rather quickly.⁵³ The criminal responsibility of enlisted men for such offenses was, however, not clearly fixed for many years. Officers were expected to have a more highly developed sense of their moral and civil responsibilities. Furthermore, officer offenses against dependents could readily be characterized as conduct unbecoming an officer and gentleman. In cases involving enlisted men, it was difficult to find the requisite prejudice to good order and military discipline if the offense occurred in private or away from a military post.⁵⁴ There was no satisfactory basis for attaching a general liability to enlisted members until 1916 when the Articles of War were changed to authorize punishment for conduct of a nature to bring discredit upon the military service.⁵⁵

A soldier may now, regardless of rank or grade, be punished under the *Uniform Code of Military Justice* for mistreating⁵⁶ or failing to support his family⁵⁷ or for failing to comply with the custody, support, or alimony decree of a civil court.⁵⁸ Enforcement

⁵⁰ Such as barring her from the post, pursuant to 18 U.S.C. § 1382 (1958). Cf. Command VA3d(2), DIGEST OF OPINIONS OF THE JUDGE ADVOCATES GENERAL OF THE ARMY—1912, at 267 (1917).

⁵¹ Cf. JAGA 1963/3601, 15 Feb. 1963, reported in U.S. DEP'T OF ARMY PAMPHLET No. 27-101-123, March 20, 1963; para. 15a(7), Army Regulation 210-14, 4 Oct. 1963.

⁵² Cf. paras. 11a(1)-(2). Army Regulation 635-105, 13 Dec. 1960 with Changes 4, 5, and 6.

⁵³ See Article of War LXI B 13, B 14, DIGEST OF OPINIONS OF THE JUDGE ADVOCATES GENERAL OF THE ARMY—1912, at 143 (1917).

⁵⁴ See WINTHROP, *op. cit.* supra note 4, at 1123-26, 1136.

⁵⁵ See C.M. 139139 (1920), DIGEST OF OPINIONS OF THE JUDGE ADVOCATE GENERAL OF THE ARMY, 1912-1940, at 348 (1942).

⁵⁶ See CM 401365, *Schiefer*, 28 CMR 417 (1959).

⁵⁷ Cf. ACM 6822, *Francis*, 12 CMR 695, 703 *pet. denied*, 3 USCMA 837, 13 CMR 142 (1953).

⁵⁸ Cf. JAGA 1958/1511, 27 Jan. 1958, 8 DIG. OPS. 188 (1959).

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policies vary with individual commanders.⁵⁹ The majority are probably reluctant to investigate and to intervene in family disputes,⁶⁰ except those involving charges of extreme physical cruelty or non-support.⁶¹ They know the tangled nature of such problems and their own limited competence to solve them. Some commanders, however, probe the merits of every complaint and by persuasion, coercion, or disciplinary action bring about some kind of peace.

Financial support for a wife and legitimate children can be exacted rather easily from an enlisted man of the lower grades. In 1950, Congress revived a World War II compulsory allotment procedure initiated by or on behalf of an enlisted man's family for diverting part of his pay.⁶² In 1962, the statutory authority was amended so that senior enlisted men were exempted from this procedure.⁶³ The compulsory allotment is a more efficient means for enforcing the duty to support than trial by court-martial or a support action brought by the wife in a civil court. The standards and procedures used in administering the allotment process have sometimes, however, led to unfair results.⁶⁴

D. FAMILY QUARTERS

The soldiers who occupy family quarters on an Army post have less privacy and freedom in the use of their homes than they would

59 An officer who is senior to, but not the commanding officer of, a soldier is not acting in an official capacity when he interferes in a dispute between the soldier and his wife. CM 196923, *Frakes*, 3 BR 47 (1931) (semble).

60 See the attitude expressed by the commanding officer in *United States v. Hines*, 7 USCMA 75, 79, 21 CMR 201, 205 (1956).

61 For the current role of the commander, judge advocate, and legal assistance officer in non-support cases, see para. 37, Army Regulation 600-20, 3 July 1962 with Changes 3, 5, and 7.

62 See S. REP. No. 1579, 87th Cong., 2d Sess. 7-8 (1962).

63 Following the change in the law, the number of non-support complaints increased sixfold. The high complaint rate has since been reduced apparently by the use or threat of punitive or administrative action against delinquent soldiers. See *Army Times*, Oct. 30, 1963, p. 3, col. 1; paras. 37a, b, Army Regulation 600-20, 3 July 1962 with Changes 3, 5, and 7. Current authority for mandatory allotments is found in 37 U.S.C. § 403(a) (Supp. IV 1963) and in 63 Stat. 812 (1949), as amended, 50 U.S.C. App. § 2204(a)(b)(c) (Supp. IV 1963), implemented for the Army by para. 5-39a(2) and para. 5-96, Army Regulation 37-104, 2 Dec. 1957, with Changes 1-79.

64 In the period 1950-1955, a wife could receive a compulsory allotment even though she were unfaithful to, or had deserted, her soldier-spouse. He could cancel the allotment only by producing a civil decree or written agreement relieving him of his support obligation. In 1955 Army regulations were amended to authorize cancellation on convincing proof of marital infidelity or desertion. Compare paras. 26b(2), 30b(1), Special Regulation 35-1465-15, 28 May 1953, with paras. 29b(3), 33b(1), Army Regulation 35-1465, 7 July 1955.

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if they were living in a civilian community. For example, a soldier living on post has no right to deny entry to his commanding officer when the latter is investigating a disturbance in the soldier's quarters.⁶⁵ His right to entertain guests seems to be subject to the installation commander's power to bar undesirable persons from the post.⁶⁶

Broad discretion is given the post commander in the matter of local police and sanitation regulations for family quarters.⁶⁷ Requirements on some posts have no parallel in civil life. The senior occupant of an apartment building, for instance, may be made responsible for the appearance of the grounds and common areas of the building. He may be empowered to draft other occupants for grass-cutting and clean-up details.

The directives pertaining to government quarters at most posts, however, are not unreasonable and have their counterparts in the ordinances of closely regulated municipalities and the lease terms required by cautious landlords. Their drafters seem to feel that quarters should be a "home" in the legal, as well as the physical sense. At one Army post recently, the staff judge advocate was asked for an opinion on whether the wife of a soldier should be allowed to conduct a cosmetic sales business from the family's quarters, in view of a post regulation prohibiting the operation of any business in quarters. In an opinion recommending that the soldier's wife be allowed to continue her business, the judge advocate pointed out that the regulation was susceptible to two constructions. If read literally, it would prohibit dependent wives from carrying on in quarters any money-making activity no matter how genteel. Alternatively, the regulation could be interpreted to ban the use of family quarters for only those business type operations which would constitute a nuisance or substantially impair the residential character of the neighborhood. The staff judge advocate favored the latter interpretation which allowed occupants of quarters the greatest possible freedom in using their homes.

IV. BUSINESS DEALINGS

A. *FREE ENTERPRISE AND THE ARMY*

Military society is not a free enterprise society. The financial dealings of Army personnel, especially officers, have historically

⁶⁵ *United States v. Hines*, 7 USCMA 75, 21 CMR 201 (1956).

⁶⁶ *Cf.* 18 U.S.C. § 1382 (1958).

⁶⁷ See para. 71, Army Regulation 210-10, 24 Sept. 1963. See CM 353793, *McGovern*, 5 CMR 154 (1952), on the authority of a commander to prescribe conditions under which guests of the opposite sex may be entertained in bachelor quarters.

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been subject to a more rigid code of conduct than those of civilian residents of a community.⁶⁸ Not only are high standards of business morality embodied in military law, but some commercial transactions have even been subject to official control at their inception.

Since World War II, the trend seems to have been away from paternalistic control and toward greater freedom in business matters. Nevertheless, supervision continues over certain aspects of a soldier's outside business, notably his off-duty employment and private indebtedness.⁶⁹

B. OFF-DUTY EMPLOYMENT

The right of a soldier, when off-duty, to accept employment and to engage in business for his own account has long been recognized,⁷⁰ subject, however, to important qualifications. The essence of these qualifications derived from many years of case law⁷¹ is set out in Army Regulation 600-50.⁷² The underlying principle is said to be that members of the Army are bound to refrain from business and professional activities and interests not directly connected with their military duties which would tend to interfere with their duties or which would give rise to a reasonable suspicion of interference with duty.⁷³ Army Regulation 600-50 does not supply comprehensive guidance for carrying this principle into effect. The problem is largely left to local commanders.⁷⁴

In some commands the individual is free to determine for himself, in the first instance, the propriety of his outside employment; normal disciplinary procedures are followed if he neglects his military duties or violates a specific statute or directive.⁷⁵ In other commands, personnel are not allowed to work during their off-duty hours without official permission.⁷⁶ For example, a directive at one

⁶⁸ See JAGA 1954/9494, 2 Dec. 1954, 4 DIG. OPS. 472 (1955).

⁶⁹ The various government employee "conflict of interest" statutes, although applicable, are not reviewed in this article.

⁷⁰ See, e.g., Absence 1C4D(2), DIGEST OF OPINIONS OF THE JUDGE ADVOCATES GENERAL OF THE ARMY—1912, at 13 (1917) (opinion rendered in 1898); 250.7, May 29, 1930, DIGEST OF OPINIONS OF THE JUDGE ADVOCATE GENERAL OF THE ARMY, 1912-1940, at 124 (1942).

⁷¹ See WINTHROP, *op. cit. supra* note 4, at 1134 (unlawful for enlisted man to operate a gambling house at or near a military post); DIGEST OF OPINIONS OF THE JUDGE ADVOCATE GENERAL OF THE ARMY, 1912-1940, at 123-24 (1942).

⁷² Para. 17, 18 April 1962 with Change 1.

⁷³ Para. 18a.

⁷⁴ See JAGA 1953/7918, 9 Oct. 1953, 3 DIG. OPS. 517 (1954).

⁷⁵ See JAGA 1952/2573, 19 March 1952, 1 DIG. OPS. 358 (1952).

⁷⁶ See Kerig, *Compatibility of Military and Other Public Employment*, 2 MIL. L. REV. 21, 82 (1958).

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post required each officer and enlisted man to submit a written request for such permission, together with a description of the prospective employment. The application was reviewed by the man's immediate commanding officer to determine whether the work would interfere with his regular duties and was then passed to the staff judge advocate, who granted or withheld permission in the name of the post commander according to the legality and propriety of the work. Many cases presented no problem ; the applications of prospective store clerks and garagemen were regularly approved ; those of would-be auxiliary policemen were denied. The fate of those who wanted to engage in some activity with a potential for abusing their military positions, *e.g.*, selling mutual funds to other servicemen,⁷⁷ or for embroiling them in unpleasant situations depended on the philosophy of the incumbent staff judge advocate.

Title 10, Section 3635, of the *United States Code*⁷⁸ contains a provision which could be applied to curtail drastically the right of enlisted men to hold outside jobs. The section states that no enlisted member may be permitted to leave his post to engage in a civilian pursuit of business, or a performance in civil life, for emolument, hire, or otherwise, if the same shall interfere with the employment of local civilians.⁷⁹ Although apparently enacted to bar the use of troops as strike-breakers, this law is now said to impose a duty on commanders to prevent their men from competing with civilians.⁸⁰ Legal and factual problems are met in applying the statute to a particular case, especially in determining whether there is interference with civilian employment. One staff judge advocate ruled that a soldier's employment would not be deemed to "interfere" with the employment of civilians unless there was evidence that an unemployed, qualified civilian applied for the same job and was rejected because of the soldier's availability. This interpretation of the statute supplies a workable standard and gives the ambitious or hard-pressed soldier a chance to supplement his modest pay.

C. INDEBTEDNESS

The American soldier presently is almost as free as the average

⁷⁷ *Cf. Op. JAGN 1957/359, 19 May 1957, 7 DIG. OPS. 240 (1958). One large mutual fund dealer is said to employ about one hundred active duty military personnel as salesmen. Wash. Post, May 9, 1962, p. A4, col. 6.*

⁷⁸ (1958).

⁷⁹ Para. 17a(4) of Army Regulation 600-50 makes the prohibition applicable to all "military personnel" without excepting officers.

⁸⁰ *Cf. DIGEST OF OPINIONS OF THE JUDGE ADVOCATE GENERAL OF THE ARMY, 1912-1940, at 123-25 (1942); JAGA 1953/7918, 3 DIG. OPS. 617 (1954). But cf. NCM 200, Bennette, 9 CMR 600 (1953).*

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civilian to over-extend himself financially. It was not always so. Unit commanders once were expected to supervise the proposed credit transactions of all their men.⁸¹ From 1910 to 1950, Army regulations provided that any person desiring to sell merchandise on credit to an enlisted man should obtain prior approval from the man's commanding officer. Without such approval, a creditor could not expect official assistance if he had trouble collecting a debt.⁸² In 1933 one post commander tried a more positive approach and prohibited "private soldiers" from contracting debts or making purchases on credit without the approval of their commanding officers. The Judge Advocate General held the order unlawful, as being inconsistent with Army regulations and violating the soldiers' "inherent legal right" to buy and sell property and services when such activities do not interfere with military duties.⁸³ In 1950 the credit monitoring scheme of earlier Army regulations with its indirect deterrent was abandoned.⁸⁴ Thenceforward, commanders would be available to advise their subordinates on proposed transactions, but would not aggressively intrude in such matters.

Although anticipatory restraints designed to keep the soldier out of debt no longer exist, the Armed Forces still do not maintain a hands-off policy with regard to the accrued debts of military personnel. A defaulting soldier is likely to be the subject of an official inquiry, and he may, unlike a civilian debtor, be punished for failing to pay a debt.

In the 1955 case of *United States v. Kirksey*,⁸⁵ the Court of Military Appeals reviewed the legality of a serviceman's conviction for the offense of negligently failing to pay a just debt. The Court, after considering the history of dept prosecutions in the services

⁸¹ Army regulations of the 19th century sometimes limited the credit a soldier could receive from the sutler or post trader without his commander's approval. See Art. 41, para. 16, General Regulations for the Army, 1821; para. 217, Revised Regulations for the Army, 1861. But see Art. XL, Regulations for the Army of the United States, 1889.

The natural improvidence of soldiers and excessive sutler credit were thought to be among the causes for the high desertion rate in 1833. CROGHAN, *op. cit. supra* note 21, at 115-16.

⁸² See, e.g., COMPILATION OF GENERAL ORDERS, CIRCULARS, AND BULLETINS OF THE WAR DEPARTMENT 141 (1918); para. 2e(6), Army Regulation 600-10, 16 Oct. 1929; para. 2e(8), Army Regulation 600-10, 2 June 1942. Inasmuch as the order was not addressed to him, a soldier who obtained credit without approval was guilty of no offense.

⁸³ 242.4, Jan. 4, 1933, DIGEST OF OPINIONS OF THE JUDGE ADVOCATE GENERAL OF THE ARMY, 1912-1940, at 926 (1942).

⁸⁴ Para. 9, Army Regulation 600-10, 10 Nov. 1950. This regulation also discontinued assistance by the Army to creditors in collecting debts from servicemen. Such assistance was later reinstated. Change 3, 4 Sept. 1952.

⁸⁵ 6 USCMA 556, 20 CMR 272 (1955).

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and the conflicting decisions of the several Boards of Review, reversed the conviction. The Court did acknowledge the existence of a military crime of failure to pay a debt, but held that the failure must be dishonorable and not merely negligent. In its decision, the Court noted that officers and enlisted men are held to "high standards of promissory responsibility" by both ethical tradition and military law.⁸⁶ Resolute measures are necessary because servicemen are "transient — often unselected — personnel removed from the customary restraints of civilian society."⁸⁷ Ordinary civil remedies are inadequate; the serviceman may be transferred before suit is brought or a judgment collected. Finally, because members of the military community are grouped in the public mind, the defaulting individual jeopardizes the credit and reputation of the whole group.⁸⁸

Army Regulation 600-2089 furnishes policy and procedural guidance to commanders who receive complaints from creditors. Commanders are told they "will not tolerate actions of irresponsibility, gross carelessness, neglect, dishonesty, or evasiveness in the private indebtedness" of their personnel.⁹⁰ Immediate commanding officers are responsible for investigating each complaint and for interviewing the serviceman involved to determine his intentions with respect to the alleged debt. If the debt is justifiably controvertible, the commanding officer notifies the complainant that the matter is one for the civil courts. If the debt is uncontrovertible, but the soldier refuses to pay, the commanding officer should take whatever disciplinary action is appropriate.⁹¹ He has no authority, however, to divert part of the soldier's pay to the creditor or to order the soldier to pay the debt.⁹²

These provisions of Army Regulation 600-20 are not uniformly applied. Not only may a particular claim present difficult factual and legal questions, but the commanding officer may be influenced by his personal opinion of the soldier-debtor, his own attitude to-

⁸⁶ *Id.* at 559, 20 CMR at 275.

⁸⁷ *Ibid.*

⁸⁸ See *United States v. Downard*, 6 USCMA 538, 20 CMR 254 (1955), in which the court reached a result similar to *Kirksey* for the offense of failing to maintain sufficient funds in a checking account to pay checks already drawn.

⁸⁹ 3 July 1962 with Changes 3, 5, and 7.

⁹⁰ *Id.* at para. 36b.

⁹¹ *Id.* at paras. 36b, d. Separation from service is authorized in aggravated cases. Para. 11(1), Army Regulation 635-105, 13 Dec. 1960 with Changes 4, 5, and 6; para. 3e, Army Regulation 635-208, 8 April 1959 with Changes 5 and 6.

⁹² Para. 36a, Army Regulation 600-20, 3 July 1962, with Changes 3, 5, and 7.

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ward debts, and pressure from his superiors and the creditor to settle the matter.⁹³

D. OTHER TRANSACTIONS

The power to declare a particular establishment "off limits"⁹⁴ has occasionally been used by a commander to keep his men from doing business with an unscrupulous merchant.⁹⁵ In 1952, the Court of Appeals for the Tenth Circuit upheld such an exercise of command power against an attack by the merchant affected, a used-car dealer.⁹⁶

During World War II and thereafter, many regulations were in force banning commercial transactions between military personnel and the inhabitants of foreign countries in which they were stationed. Such "black market," "doing business," and "currency" regulations did not have a strictly military purpose, but were intended to protect the local economies or to enforce compliance with local laws.⁹⁷ *United States v. Martin*⁹⁸ is an unusual "black market" case in that it concerns the violation of a personal order rather than a general regulation. The executive officer of a Navy ship, anchored in an Italian port, on discovering that the accused had a locker full of cigarettes, ordered him not to barter the cigarettes ashore. Thereafter, the accused allegedly disobeyed the order; he was tried and convicted for his disobedience. On review, the Court of Military Appeals did not seem troubled by the fact that the order emanated from a low ranking official, had no proven basis in any

⁹³ The Department of the Army's new "preventive law program" emphasizes the function of military lawyers in assisting commanders and individual soldiers in personal finance matters. See Army Regulation 600-14, 10 Jan. 1963; Winkler, *Chapter XIII and the Serviceman*, 17 PERSONAL FINANCE LAW QUARTERLY REPORT 140 (1963). On whether a discharge in bankruptcy relieves a serviceman of military liability for failing to pay debts, see *United States v. Swanson*, 9 USCMA 711, 715, 26 CMR 491, 495 (1958); JAGAF 1958/19, 24 Nov. 1958, 8 DIG. OPS. 188 (1959); Op. JAGN 1957/357, 10 May 1957, 7 DIG. OPS. 234 (1958); JAGA 1956/6289, 17 Aug. 1956, 6 DIG. OPS. 334 (1957).

⁹⁴ Paras. 50, 51, Army Regulation 600-20, 3 July 1962 with Changes 3, 5, and 7.

⁹⁵ The same power may be used by the Armed Forces in southern states to induce desegregation of businesses heavily patronized by military personnel. See Wash. Post, July 6, 1963, p. A8, col. 2; Wash. Post, July 27, 1963, p. B2, col. 6.

⁹⁶ *Harper v. Jones*, 195 F.2d 705 (10th Cir. 1952), cert. denied. 344 U.S. 821 (1952).

⁹⁷ See, e.g., ACM 5895, *Sarae*, 9 CMR 633 (1953); CM 354857, *Lowry*, 8 CMR 344 (1952), pet. denied, 2 USCMA 679, 8 CMR 178 (1953).

⁹⁸ 1 USCMA 674, 5 CMR 102 (1952).

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regulation, and was addressed to an individual rather than to a group.⁹⁹ Of the order itself, the Court said : "That the order related to accused's disposition of personal property owned by him does not render it illegal. . . . In view of the difficulties encountered in controlling undercover transactions and the disorders they create, the authority of the executive officer could reasonably include any order or regulation which would tend to discourage the participation of American military personnel in such activities."¹⁰⁰

The soldier's freedom to lend, borrow, buy, or sell to and from whom he pleases, on whatever terms he chooses, may also be limited if the Army has an interest in the property itself or in the other party to the transaction. Thus, regulations may lawfully bar the resale of merchandise purchased at post exchanges and Army commissaries.¹⁰¹ Cadre men may likewise be forbidden to borrow money from the recruits they are training¹⁰² and hospital personnel ordered not to borrow from patients.¹⁰³

Until recently, most judge advocate officers believed that, even without a specific regulation, it was an offense for a soldier to lend money or sell property on unconscionable terms to a military associate. In the 1960 case of *United States v. Day*,¹⁰⁴ the Court of Military Appeals made a deep inroad in this doctrine by holding that it is not a violation of Article 134, *Uniform Code of Military Justice*, for one enlisted man to charge another unconscionable interest. Judge Latimer in a colorful dissent pointed out the harmful consequences to discipline, morale, and respect for authority if noncommissioned officers are allowed to play Shylock and the adverse effect on good order if "extortionate creditors and frantic debtors" are present in a unit.¹⁰⁵ It is only fair to add that the majority was not championing an elemental free enterprise system for the Armed Forces. The opinion strongly suggests that there would be a different result in the case of an officer-lender and further suggests that the court would sustain a usury conviction if a maximum permissible rate of interest for intra-mural loans were set by service regulation

⁹⁹ According to principles of due process, the private rights of soldiers should be more susceptible to limitation by the kind of directive which is addressed to a group rather than an individual, and by a regulation emanating from a high rather than a low level of command.

¹⁰⁰ 1 USCMA 674, 676, 5 CMR 102, 104 (1952).

¹⁰¹ *United States v. Curtin*, 9 USCMA 427, 26 CMR 207 (1958).

¹⁰² See *United States v. Smith*, 8 USCMA 582, 25 CMR 86 (1958).

¹⁰³ ACM S-2898, *Hill*, 5 CMR 665 (1952).

¹⁰⁴ 11 USCMA 549, 29 CMR 365 (1960).

¹⁰⁵ *Id.* at 551, 29 CMR at 367.

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V. RECREATION AND SOCIAL LIFE

A. LEAVES AND PASSES

According to accepted military doctrine, the serviceman cannot be free to come and go as he pleases during his leisure time. Even though he has no scheduled duties, he may not leave his organization or post without permission from his commanding officer.¹⁰⁶ Traditionally, the "leave" and the "pass" have been considered instruments of command management which can be used by a commander to keep track of his men while off-duty and to increase the morale and effectiveness of his unit. They were in the past held to be privileges, the granting or withholding of which was entirely within the discretion of appropriate commanding officers.¹⁰⁷ Current Army regulations preserve much of the form of this old doctrine. Commanding officers, down to the company level, are authorized to approve leaves¹⁰⁸ and passes.¹⁰⁹ Army Regulation 630-20 emphasizes that "passes are not a right to which one is specifically entitled, but a privilege to be awarded to deserving individuals by their commander."¹¹⁰

In practice, however, the soldier today is not nearly as dependent on his commander's good will as the quoted regulation suggests. He is entitled by statute to thirty days' leave each year.¹¹¹ Naturally, a commanding officer may require a subordinate to defer a leave which would conflict with military requirements,¹¹² but eventually the soldier must have his leave or the commander may have to justify his continued refusal.¹¹³

With respect to passes, personnel garrisoned in the United States are normally at liberty to leave their posts when their day's work is done, unless they have been detailed for additional duty or

¹⁰⁶ See Moss, *OFFICERS' MANUAL* 276 (1905).

¹⁰⁷ Absence IB1a, IC4a, *DIGEST OF OPINIONS OF THE JUDGE ADVOCATES GENERAL OF THE ARMY*—1912, at 7, 13 (1917). Leave and pass policy has usually treated officers more liberally than enlisted men. See paras. 137, 140-48, 154-55, 158, 381-82, General Regulations for the Army of the United States 1841.

¹⁰⁸ Para. 5a, Army Regulation 630-5, 22 Dec. 1960 with Changes 3 and 4.

¹⁰⁹ Para. 4, Army Regulation 630-20, 24 June 1963.

¹¹⁰ *Id.* at para. 1.

¹¹¹ 10 U.S.C. § 701 (Supp. 1959-62).

¹¹² Para. 5d, Army Regulation 630-5, 22 Dec. 1960 with Changes 3 and 4. See paras. 14, 20, Appendix to Revised Regulation for the Army—1861 (leave of officers curtailed during Civil War).

¹¹³ Para. 7b, Army Regulation 630-5, 22 Dec. 1960 with Changes 3 and 4.

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are being punished for some dereliction.¹¹⁴ In special circumstances, *e.g.*, during basic training, in units with an operational mission, in overseas commands, and at isolated posts, commanders may severely restrict pass privileges.¹¹⁵ But even so, passes are not largesse to be withheld at the pleasure of a commander and to be doled out to exceptional personnel. On the complaint of a soldier, a commanding officer may have to answer to an inspector general or to a superior commander for his pass policies.¹¹⁶

In the case of *United States v. Milldebrandt*¹¹⁷ the Court of Military Appeals held illegal the order of a commanding officer that an enlisted man report his financial status once each week, during a thirty-day leave, even though the leave was granted so that the man could earn money to pay personal debts. The Court did not fully explore the power of a commander to impose conditions on an authorized absence; it did say, however, that "when an enlisted man is granted leave, he ought not be subject to orders requiring him to perform strictly military duties unless their performance is compelled by the presence of some grave danger or unusual circumstances."¹¹⁸

B. PRIVATE AUTOMOBILES

Private automobiles get a lot of immature soldiers into trouble. To commanders and judge advocates, who have to deal with injuries, property damage, and criminal offenses, it sometimes seems that Army pay and lack of parental control afford a motorized delinquent an ideal chance to express himself. Accidents, overstaying passes, imprisonment by civil authorities for driving offenses, and crimes in which the automobile plays a part are disruptive of good order and may discredit the service in the community or foreign land where they occur.

Installation commanders have authority to control the registration and operation of privately owned automobiles on Army posts and at other places over which the Army has territorial jurisdic-

¹¹⁴ Enlisted men of the lower grades must carry written passes, but officers and senior enlisted men are not required to obtain such passes. Paras. 3a, b, Army Regulation 630-20, 24 June 1963. More than a hundred years ago some commanders found that discipline and morale were improved if their men were given more freedom to leave their posts when not on duty than was customary at the time. CROGHAN, *op. cit. supra* note 21, at 122-31.

¹¹⁵ See paras. 4, 5e, Army Regulation 630-20, 24 June 1963.

¹¹⁶ See UCMJ art. 138; para. 28, Army Regulation 20-1, 27 June 1963.

¹¹⁷ 8 USCMA 635, 25 CMR 139 (1958).

¹¹⁸ *Id.* at 638, 25 CMR at 142.

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tion or an equivalent.¹¹⁹ Understandably, commanders at various levels have occasionally gone further and have sought to regulate the off-post incidents of automobile ownership and have even tried to deny personnel the right to own a car.¹²⁰

The service legal authorities have consistently upheld the right of soldiers to own and operate automobiles away from areas under military jurisdiction.¹²¹ The Judge Advocate General, for instance, ruled in 1958 that a commanding officer may not prohibit ownership of an automobile by a member nor may he impose conditions on the operation of a motor vehicle off the post, nor may he regulate speed limits for military personnel on public highways in the United States.¹²² Current regulations direct commanding officers to educate their personnel on the value of liability insurance, but deny commanders the power to compel the purchase of insurance to cover driving off the military installation.¹²³ Thus, the law presently inclines toward freedom rather than authority in motor vehicle matters. Commanders, for the most part, must forego some of the more direct methods of attack on the problem and rely on safety indoctrination programs, cooperation with local civilian authorities, and the usual disciplinary measures to restrain and punish those who misuse private automobiles.

C. ASSOCIATION WITH OTHERS

The soldier has wide latitude in choosing his own friends, both in and out of the service.¹²⁴ Generally, a superior officer has no authority to order a subordinate not to speak to or associate with particular individuals when off-duty.¹²⁵ In a war-time theater of operations or in occupied territory, of course, fraternization between military personnel and the inhabitants may be forbidden.¹²⁶

¹¹⁹ Army Regulation 190-5, 20 Dec. 1962; JAGA 1956/7147, 19 Oct. 1956, 6 DIG. OPS. 389 (1957); cf. *United States v. Smith*, 9 USCMA 240, 26 CMR 20 (1958) (jurisdiction based on international agreement).

¹²⁰ See 537.4, May 13, 1933, DIGEST OF OPINIONS OF THE JUDGE ADVOCATE GENERAL OF THE ARMY, 1912-1940, at 926 (1942).

¹²¹ See JAGA 1952/1133, 4 Feb. 1952, 1 DIG. OPS. 414 (1952); JAGAF, 1956/21, 26 Sept. 1956, 6 DIG. OPS. 388 (1957).

¹²² See JAGA 1958/5147, 10 July 1958, 8 DIG. OPS. 225 (1959). Although the opinion included overseas areas, a more recent opinion found that the overseas commander has authority based in International Agreement to establish speed limits for military personnel if there is no objection from the host state. See 126 JAGW 1962/1056, 7 March 1962.

¹²³ Army Regulation 608-10, 6 June 1961; cf. JAGA 1956/8214, 9 Nov. 1956, 7 DIG. OPS. 275 (1958).

¹²⁴ Cf. JAGA 1951/6091, 2 Oct. 1951, 1 DIG. OPS. 357 (1952).

¹²⁵ *United States v. Wyson*, 9 USCMA 249, 26 CMR 29 (1958). (The Court of Military Appeals assumes, without referring to the Constitution, a right of freedom of speech.)

¹²⁶ Cf. UCMJ art. 105.

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Although he may not, in the usual peacetime situation, be enjoined from maintaining a personal relationship, the soldier who keeps dangerous company may be liable to some type of disciplinary action or to discharge. Sympathetic association with a subversive individual or group is grounds for discharging a serviceman as a security risk.¹²⁷ Intimacy with notorious criminals or homosexuals might, if not itself an adequate basis, be a factor in separating an officer or enlisted man.¹²⁸

For quite different reasons, military custom limits fraternization between officers and enlisted personnel. The nature of the custom and the arguments of its proponents have changed over the years with changes in the character and composition of the Army and in response to internal and external pressures. Originally, there was thought to be little room for social intercourse between officers and enlisted men; the gentlemanly quality and superior talent of officers were among the reasons, although not usually articulated, for supporting the custom.¹²⁹ Now it is commonplace for officers and enlisted men to participate together in sports, community activities, and private social affairs. The influx of civilians during and after World War II, the common educational and social backgrounds of great numbers of officers and enlisted men, the responsible positions occupied by enlisted men in a technically-oriented Army, the large number of officers who have served in the ranks, and public protests against "caste" reshaped the leader's role in relation to the led.¹³⁰ Some legal restrictions on fraternization do remain, however; they are justified by defenders of the custom as necessary to preserve the respect for authority essential in time of battle or stress.¹³¹

No simple rules can be laid down defining innocent acts of comradeship and acceptable social intercourse on the one hand and improper fraternization on the other. Each officer is bound to exercise a nice discrimination; for serious lapses he may be punished under article 133 or 134 of the *Uniform Code*. There have been few reported decisions since 1951 involving convictions for wrongful acts of fraternization. In each of the cases, the officer gambled,

¹²⁷ Paras. 5b, 14b, Army Regulation 604-10, 4 Nov. 1959 with Change 2.

¹²⁸ See paras. 11a(6), (8), Army Regulation 635-105, 13 Dec. 1960 with Changes 4, 5, and 6; para. 3a, Army Regulation 635-208, 8 April 1959 with Changes 5 and 6; para. 3f, Army Regulation 635-209, 8 April 1959 with Changes 6 and 7. An officer who publicly associates with known sexual deviates to the disgrace of the Armed Forces is guilty of an offense against article 133, *UCMJ*. *United States v. Hooper*, 9 USCMA 637, 26 CMR 417 (1958).

¹²⁹ Cf. MOSS, *OFFICERS' MANUAL* 33 (1905).

¹³⁰ See JANOWITZ, *op. cit. supra* note 18, at 64-66, 79-101, 179.

¹³¹ See NCM 278, *Free*, 14 CMR 466, 470 (1953).

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caroused, or engaged in sexually immoral conduct with, or in the company of, an enlisted man.¹³² The case of *United States v. Free*¹³³ contains a good discussion of the custom and indicates some of the factors which might affect the lawfulness of any given acts. The nature of the acts themselves, the place where they occur, the presence or absence of other people, the military relationship between the officer and enlisted man, any pre-service social relationship between the two, and the likely effects of the incident on the attitudes of the enlisted man and other persons present are all important.

D. RECREATION

According to barracks folklore, the pay-day debauch is a natural part of enlisted life. The old peacetime soldier, drawn from the ruder elements of society and enduring a harsh or empty life, liked his recreation vinous and violent. Drunkenness and certain other types of disorderly behavior were not, until many years after the Civil War, punishable offenses when committed by enlisted men unless the prejudice to discipline was obvious and direct.¹³⁴ Eventually, military courts and most commanders began to see a more intimate relationship between soldiers' pastimes and the Army's morale and efficiency. This change in attitude, together with the 1916 amendment to the Articles of War authorizing punishment for service-discrediting conduct, led to higher standards of enlisted morality in military law; enlisted men can now be called to account for misconduct which once was punishable only when committed by an officer.

Official control of soldier amusements has probably been motivated in recent years more by concern for public opinion than by purely military reasons. The Army is sensitive to charges that American youths are over-exposed to sin during their military service and to countercharges that Americans in uniform are a threat to virtue and tranquility in towns near Army posts and even in entire nations.¹³⁵ Today, the Army expends much effort

¹³² See, e.g., CM 369008, *Rice*, 14 CMR 316 (1954), *pet. denied*, 4 USCMA 725, 15 CMR 431 (1954); CM 367726, *Perlin*, 13 CMR 364 (1953); CM 363479, *Atkinson*, 10 CMR 443, *pet. denied*, 3 USCMA 820, 11 CMR 248 (1953); CM 356027, *Livingston*, 8 CMR 206 (1952), *pet. denied*, 2 USCMA 676, 8 CMR 178 (1953).

¹³³ NCM 278, *Free*, 14 CMR 466 (1953) (a Navy case).

¹³⁴ WINTHROP, *op. cit. supra* note 4, at 1122. Perhaps the reason why off-duty, off-post drunkenness was usually not punished is a relative one. On the frontier, drunkenness on post and while on duty was so prevalent that the military may have found it expedient to ignore the less flagrant misconduct. See CROCHAN, *op. cit. supra* note 21, at 107-108, 111-13, 121.

¹³⁵ N.Y. Herald Tribune, Nov. 20, 1960, p. 42, col. 3; Kalischer, *Madame Butterfly's Children*, *Collier's*, Sept. 20, 1952, p. 15.

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and money to provide healthy outlets for soldier energy and to encourage moral behavior. Character guidance lectures, on-post clubs, libraries, and athletic facilities, and participation in civilian-sponsored social affairs are part of this program.

The warrior's historic right to the pleasures and solace of alcohol continues, nevertheless, to be respected under military law. The Court of Military Appeals recently reversed the conviction of an accused charged with violating an order of his commanding officer not to drink liquor. The order was given when the accused was restricted to limits for an earlier offense and was intended to prevent him from committing further crimes.¹³⁶ "In the absence of circumstances tending to show its connection to military needs," said the court, "an order which is so broadly restrictive of a private right of an individual is arbitrary and illegal."¹³⁷

This "private right" is, however, circumscribed by the *Uniform Code of Military Justice* and is subject to further definition by Army-wide and local regulations. Drunkenness is now a punishable offense regardless of where it occurs, even in the privacy of family quarters.¹³⁸ Local regulations universally ban the consumption of alcoholic beverages in barracks assigned to enlisted personnel;¹³⁹ soldiers under 21 years of age, when on an Army post, may drink no beverage stronger than 3.2 beer.¹⁴⁰ Intemperate drinking habits may be a basis for separating an officer or enlisted man from service.¹⁴¹

Other types of recreational misconduct, besides drunkenness, are punishable under specific articles or the general articles of the *Code*, even though they occur off post. Certain leisure activities, such as hitchhiking and appearances on television shows, have been prohibited or regulated by Army directives. The power to declare areas and establishments "off-limits" is commonly relied on by major commanders to keep military personnel out of trouble-spots and places frequented by prostitutes.¹⁴² However, the following observations made by a perceptive Inspector General in an 1844 report to the War Department are still valid :

Put not therefore too many restraints upon the good soldier, but during the intervals of duty let him feel that the time is his own, to pass as he

¹³⁶ *United States v. Wilson*, 12 USCMA 165, 30 CMR 165 (1961).

¹³⁷ *Id.* at 166-67, 30 CMR at 166-67.

¹³⁸ *Cf. United States v. Lowe*, 4 USCMA 654, 16 CMR 228 (1958).

¹³⁹ See para. 6a(1), Army Regulation 210-65, 30 June 1955 with Change 7.

¹⁴⁰ *Id.* at para. 8a.

¹⁴¹ Para. 11a(5), Army Regulation 635-105, 13 Dec. 1960 with Changes 4, 5, and 6; para. 3e, Army Regulation 635-209, 8 April 1959 with Changes 6 and 7.

¹⁴² *Cf.* 18 U.S.C. § 1384 (1958); paras. 50, 51, Army Regulation 600-20, 3 July 1963 with Changes 3, 5, and 7.

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may in any innocent amusement. Men who have no intellectual enjoyments ought to be encouraged to engage in athletic exercises and not chided as they sometimes are for boisterous mirth, as unbecoming. We can't make saints but we may have soldiers.¹⁴³

VI. CONCLUSIONS

The American soldier does enjoy a respectable measure of freedom to do as he pleases in his domestic affairs, business dealings, recreation and social life. His rights in such matters are based on the *Uniform Code of Military Justice*, Army regulations, custom, and judicial and quasi-judicial decisions.

The soldier's freedom to live his personal life without official intervention is, however, considerably less than that of the civilian. Tradition and necessity lend additional weight to the cause of authority when the balance is struck between individual liberty and the powers of command. Freedom for officers and enlisted men may have an elusive quality in time of war, in foreign lands, in their relationships with fellow servicemen, and in special situations, such as during the basic training process. It is, perhaps, therefore, all the more precious to the soldier.

The individual rights, privileges and immunities which have been described in this paper should, despite their qualified character, be regarded as manifestations of a more basic right—the soldier's right to a private life. The recognition, in a variety of situations, of so many legal and quasi-legal rights interrelated by nature and objective suggests a common legal source. That source or generating principle may aptly be named the "right to a private life," and it may be considered as deriving from the Constitution, more particularly from the "due process" clause of the fifth amendment.¹⁴⁴

There seems to be a long, productive future in the military order for the right to a private life. World affairs have imposed on the United States an indefinite requirement for large military forces. Isolation of the Army from civilian life and its democratic institutions is neither desirable nor possible.¹⁴⁵ The Army cannot expect

¹⁴³ See CROGHAN, *op. cit. supra* note 21, at 133.

¹⁴⁴ See CM ETO 567, *Radloff*, 2 (BR (ETO) 143, 160-63 (1943)).

¹⁴⁵ See Army Regulation 360-65, 23 Jan. 1957 with Changes 1, 3, and 4, which encourages soldiers to participate in civilian community affairs and to "tell the Army story." The discipline and legal order of any large Army is likely to reflect the national order. For an interesting description of the military order of the Russian Army, see Kelly, *The Psychology of the Soviet Soldier* in *THE SOVIET ARMY* 215-21 (Liddell Hart ed. 1956); Niessel, *The Political Basis of the Soviet Army*, *id.* at 222-28; Ely, *The Officer Corps*, *id.* at 395-402; Mackintosh, *The Soviet Soldier's Conditions of Service*, *id.* at 403-10; Koriakov, *The Military Atmosphere*, *id.* at 411-19.

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to attract and retain volunteers or command the loyalties of career personnel and inductees if its discipline leaves no room for individualism.¹⁴⁶ Furthermore, an armed service which claimed dominion over most areas of the lives of its members would contribute to making a garrison state of our country. Not only might its officers influence the young men who serve in the ranks, but they would bring their philosophy to government councils and, possibly, after their retirement, to high political office and important positions in business.¹⁴⁷

Recognition of a meaningful right to a private life is consistent with modern concepts of leadership and military discipline. It is conducive to good morale. It nourishes the initiative and self-reliance which combat may require of the **infantryman**¹⁴⁸ as well as of the technician. At the same time, in drawing a fairly distinct legal line between the spheres of official and of personal interest, it preserves necessary prerogatives and prestige to the commander. The wise commander knows the limits of his powers and by remaining within them avoids challenges which might subvert the habit of obedience. Finally, it relieves commanders of some of the feeling that they have the thankless and impossible task of solving all the personal problems of all their **subordinates**.¹⁴⁹

Lawyers, especially those who are serving or may serve in the Army, have an important mission in seeing that this doctrine is applied and in promoting its understanding and universal acceptance.¹⁵⁰ Practically all American military leaders acknowledge that the individual soldier should have a measure of liberty; however, some object to seeing extensive private rights guaranteed by law. They share a long-standing mistrust of lawyers and their **works**¹⁵¹ and prefer a military order in which commanders normally practice self-restraint, but may nevertheless intervene in the private lives of their subordinates whenever expedient. Besides this tendency to return to an entirely authoritarian discipline,

¹⁴⁶ See JANOWITZ, *op. cit.* supra note 18, at 50.

¹⁴⁷ For development of the thesis that top echelon military **officers** today exert extraordinary influence on our national life and destiny, see MILLS, *THE POWER ELITE* 6, 171-224 (1959).

¹⁴⁸ See U.S. DEPARTMENT OF DEFENSE, *THE ARMED FORCES OFFICER* 116, 142 (1950); MARSHALL, *MEN AGAINST FIRE* 36-63 (1947).

¹⁴⁹ Commanders must still be ready to offer advice and assistance to those of their men who appear to need such help. Para. 34, Army Regulation 600-20, 3 July 1962 with Changes 3, 5, and 7.

¹⁵⁰ Military lawyers should, for instance, broadcast pertinent decisions of the Court of Military Appeals to dispel among lay officers the common belief that servicemen have no Constitutional rights other than those duplicated by specific acts of Congress. See *United States v. Erb*, 12 USCMA 524, 531, 31 CMR 110, 117 (1961).

¹⁵¹ See SHERMAN, *MILITARY LAW* 130-32 (1880).

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there is one other factor which militates against complete acceptance of the idea of individual liberty. It is a characteristic which some officers have acquired from the contemporary American culture, an almost obsessive concern with public relations. There are commanders so absorbed with the "image" of the Army created by personnel in their off-duty activities that they lose sight of the soldier's legitimate urge to express the peculiarities of his own character.

So the challenge exists, particularly at the field level where the post and organizational staff judge advocate works. There is not only a problem of continual adjustment between authority and the rights of the soldier in changing military situations, but there is also likely to be opposition to any solution giving less than plenary powers to command. The lawyer in uniform must employ all his professional skill as a leader and an expert in problems of order to help shape a disciplined, effective Army in which due regard is had for the individual's right to a private life.

A SUPPLEMENT TO THE SURVEY OF MILITARY JUSTICE*

BY

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I. INTRODUCTION

This supplement considers the cases decided by the United States Court of Military Appeals during its October 1962 through 30 September 1963 term.¹ Its objective is to present a concise survey of current substantive and procedural issues of importance which have confronted the military "Supreme Court."²

11. JURISDICTION

In *United States v. Nelson*³ a discharged military prisoner contended that he was not amenable to court-martial jurisdiction. He claimed his discharge terminated his military status under the *Toth* doctrine,⁴ and that a necessary concomitant was the revival of his membership in the civilian community where trial by military tribunal is not permitted.⁵ The Court rejected this argument.

* The opinions and conclusions expressed herein are those of the authors and do not necessarily represent the views of The Judge Advocate General's School or any other governmental agency.

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¹ Consideration by Court term is the practice adopted in the prior three supplements. See generally, Note, *Survey of the Law, The United States Court of Military Appeals 29 November 1951 to 30 June 1958*, 3 MIL. L. REV. 67 (1959); Sides and Fischer, *A Supplement to the Survey of Military Justice*, 8 MIL. L. REV. 113 (1960); Davis and Stillman, *A Supplement to the Survey of Military Justice*, 12 MIL. L. REV. 219 (1961); Croft and Day, *A Supplement to the Survey of Military Justice*, 16 MIL. L. REV. 91 (1962); Mittelstaedt and Barrett, *A Supplement to the Survey of Military Justice*, 20 MIL. L. REV. 107 (1963).

² *United States v. Culp*, 14 USCMA 199, 202, 33 CMR 411, 414 (1963).

³ 14 USCMA 93, 33 CMR 305 (1963).

⁴ *Toth v. Quarles*, 350 U.S. 11 (1965).

⁵ Civilians, in time of peace, are not subject to court-martial jurisdiction. *Reid v. Covert*, 345 U.S. 1 (1967); *McElroy v. Guagliardo*, 361 U.S. 281 (1960).

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After all, the Court opined, the accused's discharge, unlike Toth's, was not unlimited. The accused did not return to the civilian community; he remained in a military prison. Hence his discharge was limited by and subject to Article 2 (7); that Article's forebearer was held a proper exercise of jurisdiction by the United States Supreme Court in 19216 in a decision which ". . . stands unmodified and unimpeached by later authority." The Court thus held Nelson generally subject to the Code.

The accused had thrown water which had deluged his confinement officer. This act led to the charge of offering violence to a "superior officer." The defense's next contention was that if the accused were subject to military law, he could not violate Article 90, under which he was convicted, because by virtue of his discharge he had no ("superior officer" as alleged in the specification. The Court assumed, without deciding, that there is no relationship of rank between a discharged prisoner and the confinement authorities, but it found a sufficient command relationship to treat the confinement officer as if he were the accused's "superior officer" within the meaning of Article 90. Implicit in the Court's retention of military jurisdiction is its belief that an opposite holding would have been inconsistent with the needs of good order and discipline in the Armed Forces.

Fourteen days later the Court, in *United States v. Ragan*,⁸ again faced the problem of jurisdiction over a discharged prisoner. General subjection to the Code, of course, had already been decided in the *Nelson* case. The accused, after an earlier conviction, had been transferred to a Federal prison. This, said the accused, irrevocably terminated military jurisdiction, notwithstanding his return to military control. The Court pointed out that while the accused was in Federal prison he claimed and was awarded rights under military regulations,⁹ and furthermore Congress by Article 58 specifically authorized the transfer of military prisoners to Federal institutions. Determinative of the issue, said Chief Judge Quinn, was the fact that Ragan was "in the custody of the armed forces" both at the time of the offenses and at the time of the trial. This met all of the constitutional and statutory requirements for the exercise of court-martial jurisdiction. Ragan still insisted that assuming the applicability of relevant parts of the Code, certainly a general prisoner could never commit disorders and neglects to the prejudice of good order and discipline as such acts must be committed by an active member of the military service. Thus, that part of his

⁶ *Kahn v. Anderson*, 255 U.S. 1 (1921).

⁷ 14 USCMA at 96, 33 CMR at 308 (1963).

⁸ 14 USCMA 119, 33 CMR 331 (1963).

⁹ *Blackwell v. Ragan*, 303 F.2d 103 (9th Cir. 1962).

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conviction founded under Article **134** (assault upon a military policeman in the execution of his duties) must be set aside. The Court considered accused's argument fallacious. Conceding that the existence of some offenses in violation of the disorder and neglect clause of Article **134** might be dependent upon a military relationship between the actor and the armed services, the Court held that the instant offense was not one of them. Here, it is solely the effect of the act upon the services which determines its criminal or non-criminal character. And, historically, military appellate tribunals had consistently upheld convictions of civilians subject to military law for acts to the prejudice of good order and discipline.¹⁰

In *United States v. Steidley*,¹¹ a challenge was raised to court-martial jurisdiction over the offenses. The accused was discharged from the Navy on 31 May **1962** and reenlisted in the same service on 1 June **1962**. At trial he pleaded guilty to seventeen specifications of larceny, four specifications of wrongful appropriation and eight specifications of forgery. Of these, only three larceny specifications occurred after reenlistment, while a fourth specification (Number **21**) was alleged to have occurred from 7 May **1960** to 9 July **1962**, leaving in doubt the exact date of the occurrence. Article 3(a), *Uniform Code of Military Justice*, permits military jurisdiction over offenses committed in a prior enlistment to survive discharge and reenlistment if the crime is "punishable by confinement for five years or more and for which the person cannot be tried in the courts of the United States or of a State, a Territory, or the District of Columbia." In applying this bifurcated test of jurisdiction, the Court set aside the four specifications of wrongful appropriation and nine of the larceny specifications because none of these was punishable by confinement for five years or more. Also dismissed were four other larceny specifications and all eight forgery specifications each punishable by confinement for five years or more. This was required by the second clause of Article 3(a) because, pursuant to Title 18, United States Code, sections **641** and **494**, respectively, these offenses even though occurring in Japan were cognizable in a Court of the United States. Since jurisdiction existed only over three specifications of larceny, and there were extensive mitigating factors in the case, the Court ordered a rehearing on the sentence. The Court directed that the jurisdictional doubt over specification **21** be resolved at the rehearing, by presentation of evidence and submission of the issue. If it occurred during the prior enlistment, the Court stated, it should be dismissed.

¹⁰ ACM 3011, Carter, 4 CMR (AF) 172 (BR. 1951).

¹¹ 14 USCMA 108, 33 CMR 320 (1963).

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111. PRETRIAL AND TRIAL PROCEDURES

A. CHARGES AND SPECIFICATIONS

1. Sufficiency.

The accused, in *United States v. Annal*,¹² was alleged to have committed an indecent, lewd, and lascivious act with the complainant by forcefully grabbing and trying to embrace him. Annal argued this failed to allege an offense) as it is clearly not criminal conduct to embrace another. The Court, in rejecting accused's argument) declared that the pleader's intent was apparent from the allegation that the embrace was "indecent) lewd, and lascivious," which "defines the character of the accused's act, and excludes the possibility that the act was innocent.)"

In *United States v. Wilson*,¹³ the accused was alleged to have wrongfully and falsely altered a character and credit reference slip with an intent to deceive in violation of Article 134, *Uniform Code of Military Justice*. An analysis of the specification showed forgery had not been pleaded because no allegation was made that the accused altered the slip with an intent to defraud, nor was there any averment that it would apparently operate to the legal prejudice of another. Also, the absence of allegations that the accused attempted to obtain or obtained property by means of the false alteration, or intended to steal, resulted in a failure to plead larceny by false pretenses. No question of an Article 107 violation was involved in this case. Nor was the specification valid under Article 134 for here the Court, in reversing, stated that the failure to aver a communication of the false slip leaves nothing "from which it can be concluded that discipline was directly affected or that the services were directly discredited.")

2. Multiplicity.

In 1961 the Court concluded that in certain situations it is proper to allege the commission of a crime over a period of time or between specific dates.¹⁴ The Government, in *United States v. Parulk*,¹⁵ utilized this method of pleading alleging that the accused did "between 30 November 1959 and 23 February 1960, steal \$352.90 . . ., the property of [A, B, C, and D], and the United States Government." Upon arraignment accused moved for "a more specific expression by the Government as to just what it is they are charging." This motion was denied by the law officer be-

¹² 13 USCMA 427, 32 CMR 427 (1963).

¹³ 13 USCMA 670, 33 CMR 202 (1963).

¹⁴ See *United States v. Means*, 12 USCMA 290, 30 CMR 290 (1961).

¹⁵ 13 USCMA 456, 32 CMR 456 (1963).

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cause he had not yet heard the evidence, but permission was granted to renew the request later in the trial. The evidence showed that the accused had committed three separate larcenies, two by false pretenses from individuals and one by embezzlement from the United States. At the close of the Government's case, accused renewed his motion asking for "some clarification from the trial counsel as to what theories under Article 121 [upon which] the trial counsel is proceeding:" Again the law officer denied accused's motion. The Court found multiple reasons for reversal. It considered the specification "doubly duplicitous" because, not only did it allege more than one offense of theft, it permitted the Government to gain a conviction on one or all of the theories embodied in the case—common law larceny, embezzlement, or an obtaining by false pretenses. The specification too "violates one of the rudimentary principles of pleading." "[O]ne specification should not allege more than one offense either conjunctively or in the alternative." And while modern pleading is abbreviated, "the general principle of fair and proper notice remains."

B. *PRETRIAL ADVICE TO CONVENING AUTHORITY AND COMPOSITION OF COURTS-MARTIAL*

1. *Pretrial Advice to Convening Authority.*

In *United States v. Smith*,¹⁶ the staff judge advocate drafted the charges and specifications, directed that they be signed by the accused's commanding officer as accuser, advised the investigating officer, and thereafter authored the pretrial advice approving the legal sufficiency of his charges and specifications finding also that they were supported by ample evidence. At trial the accused demanded a new pretrial advice because the staff judge advocate's prior participation rendered his pro forma statements that the specifications alleged offenses under the Code and were warranted by the evidence, an "empty ritual." The staff judge advocate believed he was justified in acting as he did in order to keep his office attorneys "clean" for appointment as counsel in the case. Based upon this evidence, the law officer refused accused a new pretrial advice. At the conclusion of the trial the staff judge advocate forwarded the record to the next higher headquarters for post-trial review. Judge Kilday, speaking for the Court, held the pretrial conduct of the staff judge advocate proper, the forwarding of the record after trial to another headquarters for

¹⁶ 13 USCMA 553, 33 CMR 85 (1963).

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post-trial review no admission of disqualification before trial, and that no other staff judge advocate conceivably could have rendered any different pretrial advice.

In *United States v. Ragan*,¹⁷ an additional charge was referred to the court-martial by the convening authority without first seeking consideration and advice from his staff judge advocate. A unanimous Court held the advice to be a preliminary requirement, non-jurisdictional in nature, which the accused waived by failing to object at trial.

2. *Composition of the Court-Martial.*

During a closed conference for the purpose of putting the findings in proper form, a court member stated that the accused was a private having been "busted at office hours." This the accused claimed, in *United States v. Czerwonky*,¹⁸ showed that the court member deliberately concealed his knowledge of accused's reduction in grade, which deprived him of his right to challenge the member for cause. The Court summarily rejected accused's contention that the member deliberately concealed his knowledge, pointing out it related to minor non-judicial punishment which is not "the kind of information that would induce a member to conceal his knowledge of it for fear of being challenged for cause." Furthermore, the charge sheet listed the accused as a private first class in charges I and II, dated **19 March 1961**, and as a private in an additional charge dated **21 May 1961**. Therefore, the member's comment, in the opinion of the Court, was based upon matters presented in open Court. And even assuming prior knowledge, the Court stated, "we perceive no possibility that the knowledge, and the member's disclosure of it in closed session, prejudiced the accused as to either the findings or the sentence."

In *United States v. Hodges*,¹⁹ the law officer before trial read the testimony which witnesses gave at the Article **32** investigation. Accused challenged the law officer at the beginning of the trial and again on the second day of his four day trial alleging that the law officer had "necessarily formed a prior opinion" as to the accused's guilt or innocence. The law officer denied any preconceived opinions, stating that he read the statements "to determine whether there were questions which would most likely arise which would permit . . . research." The Court, in affirming, stated it was not good practice for the law officer to read any part of the Article **32** investigation, thus reaffirming its earlier position in

¹⁷ 14 USCMA 119, 33 CMR 1 (1963).

¹⁸ 13 USCMA 353, 32 CMR 353 (1962).

¹⁹ 14 USCMA 23, 33 CMR 235 (1963).

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United States v. *Fry*,²⁰ but it was not per se reversible error. In closely scrutinizing the record of trial no bias or prejudice was found which could be attributed to the law officer.

Before this Court term law officers were adopting the salutary practice of holding preliminary hearings, before the court-martial members met, on such problems as the providency of accused's guilty plea, interlocutory legal issues, and general pretrial matters. This aided the expedition of the trial itself because, lacking a preliminary hearing, the aforementioned issues would have to be settled in an out-of-court hearing after the court-martial members met. And, as the court-martial members have no function in the out-of-court hearing, their valuable time is lost. *United States v. Robinson*,²¹ however, has generally halted utilization of the preliminary hearing. There, before the court-martial members assembled, the law officer, trial counsel, defense counsel, individual defense counsel, accused, and the reporter met at a preliminary hearing, and the appropriate officials were sworn. This action was taken with the expressed consent of the accused. Later when the court-martial members met they were sworn, but the law officer, trial counsel, defense counsel, and reporter were not. No plea was entered before the full court-martial, as the arraignment, plea, and acceptance of the plea occurred at the preliminary hearing. This conduct, the Court of Military Appeals felt, required reversal because a law officer has no power to act for the full court-martial before the court-martial itself is constituted. "Therefore, at the time of appellant's 'plea of guilty', [and alleged arraignment] there was no legally convened court-martial."

The Court's dicta, however, went far beyond its holding that an arraignment must take place before the full court-martial. It stated :

There is no provision in military law for "preliminary hearings," "pretrial hearings," nor one-officer general courts-martial. If any of such is to exist it shall be by act of Congress which can at the same time provide the safeguards against abuse which it deems to be adequate?

The effect of the dicta was to almost abolish the preliminary hearing as a vehicle for expediting court martial proceedings. It is hoped that subsequent decisions²³ limiting *Robinson* to its peculiar facts will have the desired effect of restoring the preliminary hearing to its proper and utilitarian place in military law.

²⁰ 7 USCMA 682, 23 CMR 146 (1957).

²¹ 13 USCMA 674, 33 CMR 206 (1963). Quinn, C. J., dissented.

²² *Id.* at 681, 33 CMR at 213 (1963).

²³ CM 409362, *Ortiz*, 11 June 1963; CM 409315, *Moses*, 27 May 1963; and CM 409527, *David*, 14 June 1963, *pet. denied* 18 October 1963.

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C. MOTIONS

1. *Motion for Severance.*

The effect of a co-accused's plea of guilty upon the accused's defense against an assault and battery charge at a joint trial came before the Court in *United States v. Baca*.²⁴ Baca and his co-accused, Aranda, were both represented by different lawyer counsel. After Aranda's plea no motion for a severance was made by the accused. Chief Judge Quinn, writing for an undivided Court, stressed that because of the "great potential prejudice" present the preferred practice is to move, before trial, for a severance. But failing in this, strong cautionary instructions could prevent the potential prejudice, provided the co-accused are not "inseparably connected." In the latter event, either a severance or a mistrial would be mandatory. Affirmance was required here because, as Chief Judge Quinn said, the Government's theory was that Baca aided and abetted Aranda, while the accused defended on the theory he was a mere innocent bystander at the scene of the assault. This theory of separate, independent acts by the two accused, coupled with strong cautionary instructions requiring that conclusion, meant Aranda's plea of guilty had no direct bearing on proof of Baca's guilt, and therefore could not have prejudiced the court-martial against him.

Later in the term the Court, in *United States v. Oliver*,²⁵ again faced the *Baca* issue, but raised in a slightly different fashion. The accused, who pleaded not guilty, was tried jointly with a co-accused who pleaded guilty to housebreaking and larceny. Before trial, Oliver moved for a severance which was denied by referral of the case to a joint trial with provision for separate defense counsel. No new request for severance was made at trial. Oliver, at trial, admitted participation in the criminal acts, but defended on the basis of having been coerced into the acts by his co-accused, who was seventeen years older, had sixteen years more service, and was of much larger stature. Chief Judge Quinn, writing the majority opinion, listed two preliminary questions — "(1) Is a motion for a severance made at an appropriate time, if it is made to the convening authority before reference of the charges to trial; (2) if a motion before the convening authority is appropriate, is the accused entitled to appellate review of an adverse ruling, without renewing the motion at trial?" — which he did not feel constrained to answer. Instead, in going to the merits of the case, he held that any harm caused by a joint trial would be to

²⁴ 14 USCMA 76, 33 CMR 288 (1963).

²⁵ 14 USCMA 192, 33 CMR 404 (1963).

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“. . . the person who allegedly exerted the coercion, not the purported victim.” Hence the accused in this case would clearly not be prejudiced. Judge Kilday, concurring, would not permit appellate review of a motion for severance denied by the convening authority and not renewed at the trial. As the law officer, under prior decisions, should not be aware of any pretrial requests, it would be unreasonable to require him to act without a renewal of the motion at trial.

2. *Mistrial.*

In *United States v. Seay*,²⁶ a member of the court-martial submitted a written question to the law officer asking why the accused was not given an opportunity to testify on his own behalf. The law officer, after marking the paper as an appellate exhibit, commented that “. . . the matter has been taken care of.” The accused, claiming that the question was inherently prejudicial, moved for a mistrial. The law officer denied this motion, but he offered to instruct the court-martial on accused’s right to remain silent. The accused opposed this instruction, and none was given. On appeal, the accused reasserted the appropriateness of his motion for a mistrial. The Court rejected accused’s contention that he was entitled to a “mistrial or nothing.” Citing Federal practice of curative instructions used pursuant to Title 18, *United States Code*, Section 3481, and interpreting the court-martial member’s question as paternalistic rather than hostile, no prejudice to the accused was found emerging from this incident.

The accused pleaded guilty to wrongful appropriation, in *United States v. Walter*,²⁷ based upon the advice of an Air Force lawyer that this crime could be committed with a general, rather than a specific, intent. When the defense counsel was informed of his error, he requested and was granted withdrawal of accused’s plea. The defense counsel neither sought a continuance nor requested a mistrial, and the law officer made no admonition to the court-martial. On appeal the accused urged that the law officer erred in not granting a mistrial *sua sponte*. Noting that the statutory procedure enunciated in Article 45, *Uniform Code of Military Justice*, had been followed; that the issue of accused’s specific intent had been litigated under proper instructions; and that the Government’s evidence of guilt was clear and compelling, the Court affirmed the decision of the Board of Review.

²⁶ 13 USCMA 540, 33 CMR 72 (1963).

²⁷ 14 USCMA 142, 33 CMR 354 (1963).

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D. CONDUCT OF TRIAL

1. *Right to Counsel.*

Recognizing the importance of military counsel to an accused who is brought before the bar of a general court-martial, the Court held that an accused has “. . . as a matter of right, the privilege of having appointed military counsel represent him in addition to any individually selected attorney, military or civilian.”²⁸ And so fundamental is the right to civilian counsel of one’s choice that when denied a reasonable opportunity to employ counsel, the case merits *per curiam* reversal.²⁹ But the right to counsel before a special court-martial, while constitutionally required, is satisfied by Article 27(c) of the Uniform Code of Military Justice, which provides for non-lawyer representation.³⁰

2. *Inadequacy of representation.*

The Court has shown an unwillingness to unfoundedly stigmatize defense counsel with the label of inadequacy. The accused, in *United States v. Chadwell*,³¹ made no complaint at trial about his counsel’s actions, but on appeal he complained that he had not received competent legal representation at a pretrial conference. His specific complaint was that his counsel led him to reveal information concerning an uncharged offense resulting in an additional charge. While the Court agreed the accused may have been led to testify against himself, this isolated instance did not constitute inadequate representation. The defense counsel was able to eliminate several charges and specifications against the accused, secured a sentence agreement well below the maximum and well below what the accused stated he would accept, and he “represented the accused with integrity and with a commendable desire to help” him.

The Court has not indiscriminately attached the label of inadequacy to non-lawyer counsel, as indeed it should not. But neither will the failure to protect the substantial rights of an accused go uncorrected. If non-lawyer counsel fail in their minimal duty to present to the court-martial evidence in mitigation and extenuation which they possess, reversal is mandatory.³²

²⁸ *United States v. Tellier*, 13 USCMA 323, 327, 32 CMR 323, 327 (1962).

²⁹ *See United States v. Potter*, 14 USCMA 118, 33 CMR 330 (1963).

³⁰ *United States v. Culp*, 14 USCMA 199, 216, 218, 33 CMR 411, 428, 430 (1963) (Quinn, C. J., and Ferguson, J., concurring).

³¹ 13 USCMA 361, 32 CMR 361 (1962).

³² *United States v. Hamilton*, 14 USCMA 117, 33 CMR 329 (1963).

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3. General.

“This record presents a shocking example of how a general court-martial should not be tried.” This opening line set the tone of the Court’s opinion in *United States v. Scoles*.³³ The accused, charged with larceny and wrongful sale of Government gasoline to German civilians, was not identified by the Germans at the pre-trial investigation. During pretrial interviews the German witnesses stated that all of the soldiers from whom they had purchased gasoline had been attired in fatigues. The president, at trial counsel’s request, convened the court-martial in fatigues. At the trial, accused’s request to appear in “Class A” uniform was denied, and his objection to appearing in fatigues was overruled. He was, however, permitted to wear another soldier’s name tag and sit in the spectator section of the court-martial room when witnesses were attempting to identify him. In reversing, the Court of Military Appeals stressed that the fatigue uniform is inapposite to the dignity required in the military judicial system. Nor may the fatigue uniform “be cleverly utilized by the trial counsel as a weapon to render less onerous the burden of identifying the accused as one of the guilty parties in this maze of illegal transactions.”

IV. MILITARY CRIMINAL LAW

A. SUBSTANTIVE OFFENSES

1. “Bad Checks,” Article 123a.

The Court of Military Appeals, in this term, was for the first time presented with an opportunity to construe the extent and meaning of the “Bad check” offense adopted by the eighty-seventh Congress.³⁴ In *United States v. Margelony*,³⁵ The Judge Advocate General of the Army certified to the Court the question:

Was the Board of Review correct in holding that Article 123a of the Uniform Code of Military Justice preempted all bad checks offenses under Article 134 and therefore abolished the offense of making and uttering a worthless check and thereafter wrongfully and dishonorably failing to maintain sufficient funds for payment thereof?³⁶

³³ 14 USCMA 14, 33 CMR 226 (1963). See Judge Kilday’s separate opinion for its limitations with respect to joining the majority.

³⁴ UNIFORM CODE OF MILITARY JUSTICE [hereafter cited as UCMJI art. 123a (enacted as Pub. L. 87-385, act of 4 October 1961, 87th Cong., 1st Sess., 75 Stat. 814) 10 U.S.C. § 923a (Supp. IV, 1962).

³⁵ 14 USCMA 55, 33 CMR 267 (1963).

³⁶ CM 407868, Margelony, JAGJ 1962/8635, 2 October 1962.

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Margelony had been charged with three specifications alleging issuance of worthless checks with intent to defraud, in violation of Article 123a. At the trial, the court-martial excepted the allegation of fraudulent intent but found the accused guilty of dishonorable failure to maintain sufficient funds on deposit for payment of the checks on presentment, in violation of Article 134 of the Uniform Code of Military Justice. The board of review dismissed the findings of guilty of the check offenses on the theory that Congress in enacting Article 123a intended every offense predicated upon the issuance of a worthless check be prosecuted under that Article.³⁷ In writing the majority opinion for the Court, Chief Judge Quinn considered this theory but rejected it. As originally proposed, Article 123a was intended to provide an "additional" means of prosecution, rather than a replacement or substitute for then existing forms of prosecution for transactions involving worthless checks. Accordingly, Judge Quinn concluded, "we find no intention or desire on the part of Congress to bring the dishonorable failure to maintain offense within the ambit of Article 123a." In answering the question whether the dishonorable failure to maintain offense was lesser included within a charge laid under Article 123a, he considered the fact that the offense had been included as a lesser offense in the new *Addendum to the Manual for Courts-Martial, United States, 1951* (January 1963), as strong evidence. The principal difference between the two offenses are the words "then knowing" relating to the new offense and "thereafter" relating to the old offense. The dishonorable failure offense is related solely to the time of presentment of the check while the new offense requires the accused's knowledge of the insufficiency of his account at the time of issuance of the check. Finally, in considering the specification under Article 123a, the court determined that the specification alleges more than just the time of the commission of the offense; it also refers to the state of the account at the time of presentment of the check for payment. Accordingly, it concluded that "included within the allegations of the specification is fair notice of the offense of dishonorable failure to maintain sufficient funds, in violation of Article 134."

³⁷ After Article 123a became law, the Department of the Air Force took the position that the new article preempted "the [former] offense of making a worthless check with intent to deceive in violation of Article 134," but did not affect the lesser Article 134 offense of dishonorable failure to maintain sufficient funds for payment of a check on presentment. See *United States v. Margelony*, 14 USCMA 55, 57, 33 CMR 267, 269 (1963).

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In *United States v. Bowling*³⁸ this conclusion was further reinforced. The accused had been convicted of eleven specifications alleging issuance of worthless checks with intent to defraud in violation of Article 123a. The law officer failed to instruct on the lesser included offense of dishonorable failure to maintain funds to meet the checks on presentment, although there was sufficient evidence in the record of trial to place this in issue. The omission of the instruction was prejudicial error and the case was reversed based on *Margelony*.

2. Assault, Articles 128, 134.

The question whether an assault upon a commissioned officer, not in the execution of his office, constitutes a cognizable violation of the General Article of the Code, rather than an offense under Article 128, was effectively settled in *United States v. Toutges*.³⁹ The accused was charged with assaulting a commissioned officer, in violation of Article 134. Defense counsel conceded that a valid finding of guilty of assault and battery, in violation of Article 128, was established but contended that Congress in enacting Article 90 of the Uniform Code had acted in the area of assaultive conduct toward commissioned officers, and thereby preempted the area, except to the extent of Article 128. In a unanimous opinion the Court looked to the history of the offense before concluding that Congress had intended to give effect to the well sanctioned military practice of treating the two as separate offenses with different punishment limitations. The offense of assault upon a commissioned officer, not in the execution of his office, has an obviously more serious potential for harm than in the case of a simple infraction of Article 128, and requires proof that the accused knew the identify of the victim and that his conduct was service discrediting or prejudicial to good order and discipline.

In *United States v. Ragan*⁴⁰ the issue of preemption of assaults under Article 134 by Article 128 was again before the Court in connection with an assault upon a person engaged in the execution of military police duties. The accused was a dishonorably discharged prisoner who contended that only an active member of the military service can engage in conduct to the prejudice of good order and discipline. The Court ruled that the existence of a military relationship is not what is essential to establish a violation of Article 134 but the effect of the accused's act upon the service. It

³⁸ 14 USCMA 166, 33 CMR 378 (1963).

³⁹ 13 USCMA 425, 32 CMR 425 (1963).

⁴⁰ 14 USCMA 119, 33 CMR 331 (1963).

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went on to hold that Congress did not intend to limit all prosecutions for assault and battery to Article 128. Proof that the victim was in the execution of police duties at the time of the assault will establish conduct that has “a direct and palpable prejudicial impact upon good order and discipline” so that the imposition of a greater punishment is authorized, “whether the offense is laid under Article 128 or Article 134.”

3. *Communicating a Threat, Article 134.*

The offense of communicating a threat is complete with the wrongful communication of an “avowed present determination or intent to injure presently or in the future.” In *United States v. Gilluly*⁴¹ the accused, as a “practical joke,” told a telephone operator in three separate calls that “he had a bomb planted at Fort Hood . . ., one at the Officer Club and one at the NCO club to go off at 11:05.” The Court reaffirmed its earlier holdings that in this particular offense it is the expressed intent and not necessarily the actual intent of the declarant which governs. Also, the requirement of communication was satisfied by evidence that the threat was communicated to someone regardless of whether he further communicated it to the person ultimately threatened.

4. *False Swearing, Article 134.*

Generally, the same rules which measure the sufficiency of proof in perjury cases apply in instances of false swearing. This rule was reaffirmed in *United States v. Purgess*.⁴² Purgess, an Army Captain, procured a set of seat covers for his private automobile from Government stock. These covers were purchased from a German manufacturer and sold exclusively to the Army. Subsequently, an investigation ensued into alleged misappropriation of government tires and seat covers and it was discovered that the accused’s automobile was equipped with covers exactly like those stocked by the Army. In the course of the investigation, Purgess, under oath, stated “to the best of my knowledge the seat covers came from a German concern.” This statement became the basis for trial, *inter alia*, on a charge of false swearing. The Court of Military Appeals determined that the evidence established that the covers “came from a German concern,” albeit by way of Government purchase, stocking, and theft therefrom. There was no evidence that the false statement was intended to mean that the covers had been purchased for Purgess’s private use from a German supplier. Although the statement was ambiguous, relying on

⁴¹ 13 USCMA 458, 32 CMR 458 (1963)

⁴² 13 USCMA 565, 33 CMR 97 (1963).

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the overwhelming authority of the Federal courts in the area of perjury, the Court concluded the doubts **as** to the meaning of allegedly false testimony should be resolved in favor of truthfulness. It was held, therefore, "that statements under oath which are literally, technically, or legally true cannot serve **as** a basis for a conviction of false swearing."

The scope of authority for administering oaths and the offense of false swearing, as determined by the United States Court of Military Appeals in *United States v. Claypool*,⁴³ were reexamined in *United States v. Whitaker*⁴⁴ and a companion case, *United States v. Savoy*.⁴⁵ Each accused had been placed under oath by a criminal investigator prior to interrogating him about offenses of which he was the chief suspect. In both cases the investigators, acting pursuant to the Code, were authorized to administer oaths "necessary in the performance of their duties."⁴⁶ In neither case was the oath required by law and defense appellate counsel in *Whitaker* contended that the military policeman investigator exceeded the statutory scope of "performance of [his] duties." The Court disagreed, adding "in false swearing . . . it is sufficient if the oath be administered, in a matter in which an oath be either required *or authorized* by law, and by a person with authority to administer such oath." The requirement that the oath be "necessary" should be construed to mean essential to the desired end of determining truth and not limited to situations where an agent is required to administer an oath to a suspect. Additionally, the Court held that it would not impute an impure motive to the military policeman in placing the accused under oath on the basis of an unsubstantial allegation made for the first time on appeal claiming that the investigator's sole purpose **was** to have the accused lie under oath and thereby make himself liable for an addition offense.

5. *False Claim, Article 132.*

A submission of a false statement to cover payments previously received may support a conviction of making and using false papers in support of claims against the United States, in violation of Article 132. In *United States v. Ward*⁴⁷ the accused, in response to a request from the pay clerk in November, signed a false certification that **he** had completed a jump in August and for

⁴³ 10 USCMA 302, 27 CMR 376 (1959).

⁴⁴ 13 USCMA 341, 32 CMR 341 (1962).

⁴⁵ 13 USCMA 419, 32 CMR 419 (1962).

⁴⁶ UCMJ, art. 136(b) (4).

⁴⁷ 14 USCMA 3, 33 CMR 215 (1963).

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which he had received jump pay in August, September and October. The argument was urged that no false document was made "for the purpose of obtaining the approval, allowance, or payment of any claim against the United States," within the meaning of Article 132, since approval, allowance *and* payment, *as* alleged, had taken place prior to presentment of the false manifest. In rejecting this contention, the Court noted that without the submission of the proper documents, the Government would have recouped the amount in question from the accused's pay so that the jump manifest was necessary to prevent disallowance of his claim. The statutory prohibition is in the disjunctive, and the offense is equally made out whether the purpose of the perpetrator be to obtain approval, *or* payment of a claim, or all three. Thus, that portion of the specification alleging approval, allowance, *and* payment in the conjunctive may be properly limited to any one of the alleged purposes for submission of the claim and the additional purposes may be treated as mere surplusage.

6. *Failure To Obey Order or Regulation, Article 92.*

In *United States v. Webber*⁴⁸ the accused pleaded guilty to wrongful appropriation of an airplane and three separate specifications of violation of an Air Force regulation which "prescribes the general flight rules which govern the operation of Air Force aircraft flown by Air Force pilots. . . ." The board of review concluded that while the accused acted as a pilot in fact when he flew the aircraft he was not a pilot as such within the meaning of the safety regulation which was intended to apply only to those "officially recognized" as having the skills, knowledge, and judgment required to fly an airplane. The Court of Military Appeals agreed with the board's interpretation of the regulation and rejected Government appellate counsel's argument that violation of the regulation was such wanton disregard for safety as to amount to criminal conduct *per se*. It concluded that the accused's conduct may have constituted an extreme departure from common-sense rules of air traffic, but, in the absence of a specific statutory or regulatory prohibition *and* injury to persons or property, it is not criminal to fail to exercise the degree of care a reasonable man in like circumstances would exercise.

7. *Possession and Sale of Narcotics, Article 134.*

In *United States v. Maginley*⁴⁹ the Court considered the question whether wrongful possession of marihuana was a lesser in-

⁴⁸ 13 USCMA 356, 33 CMR 68 (1963).

⁴⁹ 13 USCMA 445, 32 CMR 445 (1963).

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cluded offense of wrongful sale. The accused had been convicted upon unrelated charges of wrongful possession and wrongful sale of marihuana. The wrongful possession count was set aside by the board of review because of an illegal search and seizure and the wrongful sale count was set aside for insufficient evidence as the accused acted as an agent in obtaining and transferring the drug without actually receiving title. In reply to the certified question whether there are any lesser included offenses under wrongful sale the Court applied the standard test for determining a lesser offense: "whether, considering the allegations and the proof 'each requires proof of an element not required to prove the other.'" ⁵⁰ Since a sale involves a transfer of title with or without possession, while possession does not necessarily involve any exchange of the ultimate interest in the drug, the Court ruled that wrongful possession, although proven by the evidence, is not a lesser included offense where the specification alleges only the wrongful and unlawful sale of marihuana. Similarly, procurement and transfer also are not lesser included offenses since such acts extend beyond mere transfer of title and may constitute a simple exchange of possession. Accordingly, it was concluded that the offenses of wrongful sale, possession or use of the drug are separate and equal offenses and should be treated as such.

8. Breach of the Peace, Article 116.

In *United States v. Hewson*⁵¹ a majority of the board of review determined that disorderly acts "when committed in a cell of a prison, stockade, or similar confinement facility, are not committed in a 'public place' nor, . . . are they considered as disturbing that segment of society or the public peace or tranquility of which the law, including Article 116, Uniform Code of Military Justice, is intended to protect." On certified question from The Judge Advocate General of the **Army**,⁵² the Court noted that the offense was new in military justice but well established at common law. It found it is the accused's conduct itself, and its tendency to affect or upset public order which is made criminal, rather than such behavior in a particular location. The commission of a breach of the peace depends not upon whether an accused's acts occur in surroundings which members of the public frequent. Rather, it depends upon whether his behavior, not otherwise protected or privileged, tends to invade the right of the

⁵⁰ Citing *United States v. Oakes*, 12 USCMA 406, 407, 30 CMR 406, 407 (1961).

⁵¹ See 13 USCMA 506, 507, 33 CMR 38, 39 (1963).

⁵² CM 407710, *Hewson*, JAGJ 1962/8726, 15 November 1962.

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public or its individual members to enjoy a tranquil existence, secure in the knowledge that they are guarded by law from undue tumult or disturbance.

B. DEFENSES

1. Self-Defense

The single most important accomplishment of the Court for this past term lay in establishing rules for instructions on the issue of self-defense. Judge Kilday, writing for a unanimous Court,⁵³ traced the development of self-defense as a plea of necessity, and developed these principles :

a. The opportunity to retreat is one factor to be considered together with all the circumstances in evaluating the issue of self-defense.⁵⁴

b. Those expelled from a place of business cannot claim self-defense absent, at least, a showing of unlawful ejection or excessive force.⁵⁵

c. To claim self-defense one must, on reasonable grounds, be subjectively afraid of death or serious injury to use a dangerous weapon.⁵⁶

d. A defender is not limited to using a precisely identical force but may use such not inordinate means as he reasonably believes necessary for protection against the impending harm.⁵⁷

e. Those who engage in mutual combat, or any who precipitate an altercation, are not entitled to self-defense.⁵⁸

In *United States v. Smith*⁵⁹ the law officer instructed the court-martial that a person may use force likely to result in grievous bodily harm *only* when retreat by him is not reasonably possible or would endanger his own safety. This instruction was rejected because following the rule of the United States Supreme Court in

⁵³In *United States v. Brown*, 13 USCMA 485, 33 CMR 17 (1963), Chief Judge Quinn dissented on an issue unrelated to self-defense, and in *United States v. Hayden*, 13 USCMA 497, 33 CMR 29 (1963), he dissented on the weight of the evidence. Judge Ferguson dissented in *United States v. Green*, 13 USCMA 545, 33 CMR 77 (1963), on the evidence.

⁵⁴*United States v. Smith*, 13 USCMA 471, 33 CMR 3 (1963); *United States v. Hayden*, 13 USCMA 497, 33 CMR 29 (1963); *United States v. Green*, 13 USCMA 545, 33 CMR 77 (1963).

⁵⁵*United States v. Regalado*, 13 USCMA 480, 33 CMR 12 (1963); *United States v. Campbell*, 13 USCMA 531, 33 CMR 63 (1963).

⁵⁶*United States v. Regalado*, *supra* note 55.

⁵⁷*United States v. Acosta-Vargas*, 13 USCMA 388, 32 CMR 388 (1963).

⁵⁸*United States v. Green*, 13 USCMA 545, 33 CMR 77 (1963).

⁵⁹13 USCMA 471, 33 CMR 3 (1963).

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*Brown v. United States*⁶⁰ there is no categorical requirement of retreat. Rather, the opportunity to **do** so safely is only a single factor to be considered by the triers of fact together with all the circumstances in evaluating the issue of self-defense.

In *United States v. Regalado*⁶¹ the triers of fact were confronted with an accused who intervened on behalf of a friend being lawfully ejected from a gasthaus by the manager. The Court of Military Appeals determined the accused could not claim self-defense as a defense to a charge of assault with a dangerous weapon by stabbing the manager since the accused acquired no greater right than his friend and there was no evidence the manager was acting improperly or using excessive force. Also, the evidence would not support a claim of self-defense where in employing a dangerous weapon the accused asserted he was merely afraid but did not assert he was afraid of death or serious injury. Self-defense is a plea of necessity and no necessity exists to employ a deadly force *unless* the purported assailant is, in fact or on reasonable grounds, subjectively afraid of death or serious injury.

In *United States v. Acosta-Vargas*⁶² it was held that a person lawfully meeting force with a like degree of force in protecting himself is not limited to the precise degree of force threatened by the assaulter. The recommended instruction should be that “although a defender may not use such force as to become the aggressor, he is not limited to the exercise of precisely identical force or degree thereof as is asserted against him and that he may employ such not inordinate means **as** he believes on reasonable grounds necessary for protection against the impending harm under the circumstances.”

The final rule, relating to mutual combatants, was set forth in *United States v. Green*.⁶³ In that case the accused armed himself with a knife, deliberately sought out his “antagonist”, and renewed their earlier altercation. In rejecting the accused’s plea of self-defense, the Court said “there can be no question that aggressors, those who engage in mutual combat, or any who thus precipitate an altercation, are not entitled to self-defense.”

2. *Promise of Immunity.*

In a strongly worded opinion, the Court of Military Appeals struck down the testimony of a confessed participant who had

⁶⁰ 256 U.S. 335 (1921).

⁶¹ 13 USCMA 480, 33 CMR 12 (1963).

⁶² 13 USCMA 388, 32 CMR 388 (1963).

⁶³ 13 USCMA 545, 33 CMR 77 (1963).

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been granted a form of "sliding" immunity by the convening authority. The agreement provided for a one-year reduction in the participant's approved sentence for each occasion on which he testified against another of the participants. In *United States v. Scoles*⁶⁴ such a repulsive agreement was ruled contrary to public policy because it offered an almost irresistible temptation to testify falsely in order to escape the adjudged consequences of his own misconduct.

V. EVIDENCE

A. SEARCH AND SEIZURE

*United States v. Ross*⁶⁵ presented the issue whether under the protection of the Fourth Amendment against unreasonable searches and seizures a lawful search would be rendered unreasonable by seizure of items unrelated to the original purpose of the search. The accused's quarters were searched in connection with his lawful apprehension for selling promotion examinations. At the outset of the search the accused was informed the agents were looking for examinations. In the course of the search the agents discovered and seized a number of watches which subsequently became the subject of larceny charges and obtained some bank statements which were later returned. In a unanimous opinion upholding the seizure of the watches, Chief Judge Quinn reaffirmed the Court's early holding⁶⁶ that officers engaged in a lawful search "may seize items relatively apparent," despite their being entirely unrelated to the original purpose of the search. Similarly, the seizure of the bank statements did not so taint the proceedings as to make an otherwise reasonable search and seizure unreasonable.

In *United States v. Conlon*,⁶⁷ however, there was no apprehension of the accused. A private citizen, not acting for any governmental agency, under the honest belief she was entitled to possession of the premises,⁶⁸ sawed the lock off a garage door and a burglar alarm sounded. She called the local police who notified military authorities that a number of "readily apparent" items bore government markings. It was stipulated that no search warrant was obtained. The actions of all police, both civilian and military, were determined to be reasonable under the circum-

⁶⁴ 14 USCMA 14, 33 CMR 226 (1963).

⁶⁵ 13 USCMA 432, 32 CMR 432 (1963).

⁶⁶ *United States v. Doyle*, 1 USCMA 545, 4 CMR 137 (1952).

⁶⁷ 14 USCMA 84, 33 CMK 296 (1963).

⁶⁸ At the trial it was developed that she was not entitled to possession of the garage but of the house only.

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stances and their entry into the garage was, therefore, lawful. Being confronted with property bearing markings which clearly indicated its government character, and having been requested to remove all property from the garage by the person who asserted she was entitled to exclusive possession of the premises, the Court concluded the military authorities acted reasonably and lawfully in taking possession of and removing all government property from the garage. Consequently, the accused could not object to the admission of the evidence based on an illegal search and seizure. In a vigorous dissent, Judge Ferguson relied on the Fourth Amendment to express the opinion that "absent a lawful apprehension, there cannot be a search of real property upon a showing of probable cause alone."⁶⁹

Finally, in *United States v. Battista*,⁷⁰ the Court struck down a search of the accused's quarters on board ship which was not based on probable cause or in the interests of safety or security. The accused was suspected of committing sodomy and "the search was instituted to obtain evidence with which to convict [him]." Admittedly, there was no reason to believe he "had possession of any instrumentalities of his crime, its fruits, or other proper objects of a search." The agents' quest was purely an exploration of the accused's effects, without any knowledge of what his guilt might be or what evidence might be found, and permission to conduct the search by the ship's Captain was also unauthorized. Accordingly, absent probable cause the search was illegal and the fruits thereof were not admissible.

B. ADMISSIONS

When an accused's plea of guilty is determined to be improvident and a mistrial is declared, he may not be cross-examined at a subsequent trial concerning admissions made in connection with the improvident plea. In *United States v. Barben*⁷¹ the accused elected to testify on the merits in his own defense at the second trial. Trial counsel cross-examined the accused on his prior admissions. In a *per curiam* reversal of the board of review, the court affirmed its earlier opinion that "such cross-examination was prejudicially erroneous."

One of the co-accused in *United States v. Caliendo*⁷² had implicated himself by surrendering the incriminating evidence in reliance upon an ineffective "promise not to prosecute." He was

⁶⁹ 14 USCMA at 90, 33 CMR at 302.

⁷⁰ 14 USCMA 70, 33 CMR 282 (1963).

⁷¹ 14 USCMA 198, 33 CMR 410 (1963).

⁷² 13 USCMA 405, 32 CMR 405 (1962).

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then advised of his rights in accordance with Article 31 of the Uniform Code but was not told that the evidence could not be used against him nor that despite what he had been told earlier no immunity could be granted. Each of the accused then executed written confessions. Clearly, one who implicates himself relying upon an ineffective promise could bar any statement made pursuant thereto from admission into evidence. But the voluntariness of the written confession was in doubt since there was some evidence to indicate that the accused doubted the reliability of the promise of immunity. Accordingly, the court-martial was required to resolve the factual issue whether the written confession was possibly tainted by the earlier verbal act and that the accused had acted out of a conviction that the cat was already "out of the bag" and could not be rebagged.

C. HUSBAND AND WIFE PRIVILEGE

*United States v. Parker*⁷³ involved a wife who testified against her husband with respect to an act of sodomy committed upon a third party. The accused objected to her testimony on the ground of privilege. She stated she had been granted a divorce but did not produce any documentary evidence of a divorce decree and "could not say exactly what the decree stated." The Court ruled that under the circumstances of the case, her qualification as a witness by proof of having been divorced was not merely a collateral issue relating to competency and required affirmative proof that the marriage had been dissolved. Having determined that the relationship continued, the Court considered whether the wife ~~was~~ competent to testify within the meaning of paragraph 148e of the *Manual for Courts-Martial, United States, 1951*, as an "individual . . . injured by the offense with which the other spouse is charged. . . ." Noting the detestable nature of the accused's act, the Court observed that it is not how despicable the crime is which permits an exception to the general rule that a wife is not competent to testify over the objection of her husband. Rather any exception is based on the public policy born of a desire to foster peace in the family and to preserve the martial relation. Absent any authority holding that sodomy with a third person is an offense against the spouse, the Court concluded that no exception to the rule should be granted in this case.

⁷³ 13 USCMA 579, 33 CMR 111 (1963).

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VI. SENTENCE AND PUNISHMENT

A. INSTRUCTIONS ON MAXIMUM PUNISHMENT

In *United States v. Briscoe*,⁷⁴ the law officer instructed the court-martial that a “discharge in the case of a warrant officer as adjudged by a general court-martial must be a dishonorable discharge.” Briscoe claimed that the President, by paragraph 126d of the Manual for Courts-Martial, United States, 1951, established a compulsory minimum sentence in violation of his authority under the Uniform Code of Military Justice. For punishment purposes he claimed that noncommissioned warrant officers, as he was, like enlisted men were entitled to separation with either a dishonorable or bad conduct discharge. The Court at the outset dichotomized warrant officers as commissioned, and noncommissioned. The former are separated punitively by dismissal. As to the latter, the Court found they have a “separate and specially-recognized status [which] empowers the President to prescribe a single form for [their] separation from the service by sentence of a court-martial.” Hence the law officer’s instruction was correct, and the decision below was affirmed.

The Table of Maximum Punishments authorizes more severe punishment for the wrongful appropriation of a motor vehicle than for other personal property.⁷⁵ In *United States v. Webber*,⁷⁶ the Government by certification challenged the law officer’s instruction, and the Board of Review’s holding, that an airplane was not a motor vehicle for purposes of punishment under Article 121, *Uniform Code of Military Justice*. The Court in upholding the Board found persuasive authority in the United States Supreme Court decision of *McBoyle v. United States*⁷⁷ holding that an airplane was not included within the words “motor vehicle” as then defined in the National Motor Vehicle Theft Act.⁷⁸ Also when that Act was subsequently amended to include airplanes, the common meaning of motor vehicles was not enlarged; instead the Congress added the words “or aircraft” to the Act.⁷⁹ The Government also argued that value should be the test of punishment, and because airplanes are valuable, a more severe punishment should be imposed. “Taking an ancient and battered car for a ‘joy ride’ subjects the offender to the same punishment as the appropriation of a factory-fresh Cadillac,” replied the Court.

⁷⁴ 13 USCMA 510, 33 CMR 43 (1963); accord, *United States v. Dodge*, 13 USCMA 525, 529, 33 CMR 57, 61 (1963).

⁷⁵ MANUAL FOR COURTS-MARTIAL, UNITED STATES, 1951, at 223.

⁷⁶ 13 USCMA 536, 33 CMR 68 (1963).

⁷⁷ 283 U.S. 25 (1931).

⁷⁸ Act of Oct. 29, 1919, 41 Stat. 325.

⁷⁹ See 18 U.S.C. §§ 2311-12 (1958).

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B. EVIDENCE AND INSTRUCTIONS PERTAINING TO SENTENCE

In *United States v. Hamilton*,⁸⁰ the accused was tried for, *inter alia*, three specifications of making bad checks. Prior to the court-martial, restitution had been made for the checks and that fact was known to accused's counsel, who nevertheless failed to offer it into evidence on the sentence. The Court felt that this evidence would "manifestly and materially affect the outcome of the case", so it returned the case for a rehearing on the sentence.

The court-martial, in *United States v. Caid*,⁸¹ as part of its sentence fined the accused \$300.00. On appeal, the accused contended that because the President did not include a fine as a possible punishment in his instructions, it must be set aside. In addition to the instructions given, the court-martial had available a sentence work sheet which included a note that a fine was a proper punishment to mete out. After the sentence was announced, both counsel agreed that a fine was within the competence of the court-martial. In affirming, the Court of Military Appeals stated that it did not recommend sentence instructions given through the use of a work sheet, but as the knowledge that the court-martial had the power to fine was before them, and neither counsel objected to the use of the work sheet, the imposition of the fine was proper.

In *United States v. Jones*,⁸² after a finding of guilty on charges of larceny and housebreaking, the law officer instructed the court-martial that they must reach a decision on the sentence because "there is no such thing as a hung jury in the military." Perhaps no other case reaching the high Court will ever serve as a better vehicle for expressing our fundamental democratic philosophy. "To hold that the court members *must* agree or be considered as having 'failed to discharge their duty' is repugnant to the basic philosophy on which this country is established—the right of free men to disagree without being penalized therefor." Because the charge presented a fair risk of coercing the court-martial members into reaching a compromise verdict, the case required reversal.

C. PRIOR CONVICTIONS

After the accused was found guilty, the Government offered and the law officer accepted into evidence one prior conviction with a suspended sentence, and also evidence that the suspension

⁸⁰ 14 USCMA 117, 33 CMR 329 (1963).

⁸¹ 13 USCMA 348, 32 CMR 348 (1962).

⁸² 14 USCMA 177, 33 CMR 389 (1963).

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had been vacated. This, the Court said, may not be done in its decision in *United States v. Kiger*.⁸³ The meaning of paragraph 75b (2) of the Manual “is the demonstration of an antecedent military trial resulting in findings of guilty and punishment and finally approved within the meaning of the Code, supra, Article 44.” It would be dangerous to permit the proof of vacation proceedings, because many sentences are vacated without a hearing. And, it would not be good practice to permit its introduction and then, to protect the accused, allow him to attack the facts behind the vacation itself. Lastly, the Court was unimpressed with the Government’s argument that this rule permits the accused to hide his real character, since many rules “protect the defendant before military and civil tribunals from being viewed as he truly may be.”

VII. POST-TRIAL REVIEW

A. COMMUTATION

In *United States v. Brown*,⁸⁴ the sentence to a bad conduct discharge was commuted to confinement at hard labor for six months and forfeiture of \$43.00 per month for six months. The staff judge advocate recommended that the confinement be computed from the date of the convening authority’s action, and a Board of Review, narrowly construing *United States v. Prow*,⁸⁵ held the confinement could begin to run from the later date rather than from the date of the original sentence. The Court approved the change to confinement at hard labor as a less severe punishment. In *Prow*, the Court had stated that the “generating source” of the commuting authority’s action was the original court-martial sentence, and hence a Board of Review was “justified” in making the commuted sentence’s effective date, the date of original sentencing. Here the Court made that rule mandatory in all cases. It also held that when the staff judge advocate’s post-trial review is in conflict with a clear and unambiguous action by the convening authority, the action must control.

B. NEW TRIAL

The accused was convicted of rape and absence without leave in *United States v. Chadd*.⁸⁶ After the court-martial it was discovered that the prosecutrix, a Women’s Army Corps private, had been a member of a “close-knit group of ‘gay’ girls” who engaged

⁸³ 13 USCMA 522, 33 CMR 54 (1963).

⁸⁴ 13 USCMA 333, 32 CMR 333 (1962).

⁸⁵ 13 USCMA 63, 32 CMR 63 (1962).

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in homosexual activities. Two of these alleged homosexuals had testified against accused at his trial. The Government's primary argument against granting a new trial was that if prosecutrix were a homosexual as the defense claimed, this appears inconsistent with the defense's further claim of consensual relations between prosecutrix and the accused, used as a defense at the trial, since a homosexual is unlikely to engage consensually in such relations. The Court, in rejecting this, noted that the prosecutrix had been recently married, and she testified to previous consensual relations with her husband. In granting a new trial, the Court held the newly discovered evidence admissible as affecting prosecutrix's credibility, and admissible as to her consent to sexual relations with Sergeant Chadd. The Government had also argued that evidence of homosexuality would have no bearing upon a new court-martial's decision in the case. The Court, however, felt "that another court-martial would view with extreme interest evidence regarding prosecutrix's supposed degrading and disgustingly indecent behavior, since, at this trial, she was represented by the Government, albeit innocently, as a 'young, lonesome girl, [of impeccably 'good moral character'] who misplaced her trust in a Master Sergeant."

In *United States v. Day*,⁸⁷ a petition for a new trial was based primarily upon a co-conspirator's post-trial affidavit stating accused was innocent of the larceny for which he was convicted. Before the accused's trial the co-conspirator had implicated Day as an active participant in the crime. About one month after this first statement implicating Day, the co-conspirator stated he alone had committed the larceny while Day had merely pawned the property. These inconsistent statements were known to the defense counsel at trial, but he did not call the co-conspirator as a witness because he did not know if he would incriminate or exculpate the accused. The Court, in rejecting petitioner's argument, stated "[I]t is apparent therefore, that [the co-conspirator's] present representations do not constitute newly discovered evidence. What is presented in the petition for a new trial is a new tactic, not new evidence." Also, because of many inconsistencies and contradictions in statements and in the proceedings, the Court believed that a new trial could not possibly result in a decision favorable to the accused.

C. STAFF JUDGE ADVOCATES POST-TRIAL REVIEW

It is error **for** a staff judge advocate to inform the convening

⁸⁶ 13 USCMA 438, 32 CMR 438 (1963).

⁸⁷ 14 USCMA 186, 33 CMR 398 (1963).

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authority “an appropriate sentence is the sole province of the court, unless they grossly abuse their judicial powers. . . .”, for an inappropriate sentence may not be recommended, and the convening authority has sole discretion to approve or disapprove the sentence.⁸⁸ A staff judge advocate may, and indeed is required to, give his candid opinion as to whether an issue was presented to the court-martial.⁸⁹ Selectivity in presenting the evidence in a post-trial review is permissible, and the failure to emphasize the conviction record of a prosecution witness, when it was not emphasized at trial by the defense counsel, combined with the failure to present evidence of accused’s good conduct while in confinement in a second post-trial review was not, in this case, **erroneous**.⁹⁰ And, if an acting staff judge advocate is disqualified for acting on behalf of the prosecution, the post-trial recommendations prepared by him would not be adequate merely because they were ratified by a staff judge advocate without previous connection with the case.⁹¹

D. APPELLATE REVIEW

1. Review by Board of Review.

In *United States v. Bondy*,⁹² the accused **was** tried jointly with another soldier, and upon conviction that soldier received a sentence to a punitive discharge; the accused did not receive a punitive discharge. Upon review the Board of Review reduced accused’s sentence to confinement at hard labor for three months to one month. The Government, in a motion for reconsideration, took the position the Board had no jurisdiction over the case. The motion was denied. The Board reasoned that, pursuant to Article 66b, Uniform Code of Military Justice, The Judge Advocate General must refer to a Board of Review the record in every case of trial by court-martial in which the sentence involves a punitive discharge. And, this joint trial was a case which included a punitive discharge as to one defendant, hence, the Board acquired jurisdiction even though had Bondy been tried alone it would not have acquired jurisdiction over his case. The Court, reversing, refused to accept this board definition of “case”, but instead determined that the statutory meaning of “case” included findings and sentence **as** to each individual accused. As Bondy had not received

⁸⁸ *United States v. Caid*, 13 USCMA 348, 32 CMR 348 (1962).

⁸⁹ *United States v. Evans*, 13 USCMA 598, 33 CMR 130 (1963).

⁹⁰ *United States v. Cash*, 14 USCMA 96, 33 CMR 303 (1963).

⁹¹ *United States v. Mallicote*, 13 USCMA 374, 32 CMR 374 (1962)

⁹² 13 USCMA 448, 32 CMR 448 (1963).

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a punitive discharge, his "case" was not properly before the Board of Review.

Finally, in the area of appellate review by service Boards, it was held that if after a trial new issues are raised before the Board of Review by conflicting post-trial affidavits, the Board may resolve the conflict itself, or it may return the record and affidavits to the convening authority for resolution by local authorities.⁹³

2. *Review in the United States Court of Military Appeals.*

Once again the Court had an opportunity to restate the well-known rule that it is limited, in its review of evidential sufficiency, to questions of law. Its test of legal evidentiary sufficiency therefore remains "whether there is in the record some competent evidence from which the members of the court-martial were entitled to find beyond a reasonable doubt the existence of every element of the crime charged."⁹⁴

The doctrine of "cumulative error" was applied by the Court as it reversed per curiam in *United States v. Lazarus*.⁹⁵ Inadmissible hearsay was utilized against Lazarus, as well as a deposition for which a proper predicate had not been established.

VIII. APPENDIX—WORK OF THE COURT

The statistics in Table I and II are the official statistics compiled by the Clerk's Office, United States Court of Military Appeals, pursuant to the provisions of Article 67 (g), *Uniform Code of Military Justice*. The statistics in Tables III through VI inclusive were compiled by the authors, and are, thus, unofficial.

⁹³ *United States v. Strahan*, 14 USCMA 41, 33 CMR 253 (1963).

⁹⁴ *United States v. Wilson*, 13 USCMA 670, 672, 33 CMR 202, 204 (1963); *United States v. Parham*, 14 USCMA 161, 164, 33 CMR 373, 376 (1963).

⁹⁵ 13 USCMA 509, 33 CMR 41 (1963).

SURVEY OF MILITARY JUSTICE

Table I. Status of Cases Docketed ^a

| | Total as of June 30, 1961 | July 1, 1961 to June 30, 1962 | July 1, 1962 to June 30, 1963 | Total as of June 30, 1963 |
|---------------------------------------|------------------------------|-------------------------------------|-------------------------------------|------------------------------|
| | 8,470 | 431 | 353 | 9,254 |
| | | 323 | | 3,666 |
| Air Force..... | 3,448 | 193 | 204 | 3,845 |
| Coast Guard..... | 40 | 1 | 2 | 43 |
| Total..... | 15,033 | 948 | 827 | 16,808 |
| <i>Certificates (Art. 67(b) (2)):</i> | | | | |
| Army..... | 122 | 7 | 6 | 135 |
| Navy..... | 181 | 6 | 5 | 192 |
| Air Force..... | 49 | 4 | 9 | 62 |
| Coast Guard..... | 6 | 0 | 0 | 6 |
| Total..... | 358 | 17 | 20 | 395 |
| <i>Mandatory (Art. 67(b) (1)):</i> | | | | |
| Army..... | 31 | 0 | 0 | 31 |
| Navy..... | 3 | 0 | 0 | 3 |
| Air Force..... | 3 | 0 | 0 | 3 |
| Coast Guard..... | 0 | 0 | 0 | 0 |
| Total..... | 37 | 0 | 0 | 37 |

^a While this supplement covers the 1962 Court Term, the Clerk's Office, USCMA, maintains statistics on a fiscal year basis only.

Table II. Court Action

| | Total as of June 30, 1961 | July 1, 1961 to June 30, 1962 | July 1, 1962 to June 30, 1963 | Total as of June 30, 1963 |
|--|------------------------------|-------------------------------------|-------------------------------------|------------------------------|
| <i>Petitions (Art. 67(b) (3)):</i> | | | | |
| Granted..... | 1,556 | 101 | 88 | 1,745 |
| Denied..... | 13,054 | 799 | 765 | 14,618 |
| Denied by Memorandum Opinion..... | 2 | 0 | 0 | 2 |
| Dismissed..... | 10 | 2 | 0 | 12 |
| Withdrawn..... | 307 | 14 | 6 | 327 |
| Disposed of on Motion to Dismiss: | | | | |
| With Opinion..... | 8 | 0 | 0 | 8 |
| Without Opinion..... | 38 | 1 | 1 | 40 |
| Disposed of by Order setting aside findings and sentence..... | 3 | 0 | 0 | 3 |
| Remanded to Board of Review..... | 138 | 5 | 6 | 149 |

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Table II. Court Action—Continued

| | | | | |
|--|--------|-----|-----|--------|
| <i>Petitions (Art. 67 (b) (3)—Con.)</i> | | | | |
| Court action due (30 days) ^b — | 57 | 88 | 57 | |
| | 25 | 25 | 21 | 21 |
| | | 16 | 18 | |
| | | 1 | 2 | 2 |
| | | 1 | 0 | |
| | 0 | 0 | 0 | |
| | 1 | 0 | 0 | |
| | | | 2 | |
| Mandatory (<i>Art. 67(b) (I)</i>): | | | | |
| Opinions pending ^b | 0 | 0 | 0 | 0 |
| Remanded..... | 1 | 0 | 0 | 1 |
| Awaiting briefs ^b | 1 | 0 | 0 | 0 |
| Opinions rendered. | | | | |
| Petitions..... | 1,319 | 95 | 88 | 1,502 |
| Motions to Dismiss..... | 11 | 0 | 0 | 11 |
| Motion to Stay Proceedings..... | 1 | 0 | 0 | 1 |
| Per Curiam grants..... | 26 | 1 | 3 | 30 |
| Certificates..... | 306 | 15 | 17 | 338 |
| Certificates and Petitions.. | 40 | 1 | 1 | 42 |
| | | 1 | 0 | |
| | 2 | 0 | 0 | |
| | 1 | 1 | 0 | |
| | 1 | | | |
| Total..... | 1,744 | 114 | 109 | 1,967 |
| Completed cases. | | | | |
| Petitions denied..... | 13,054 | 799 | 765 | 14,618 |
| Petitions dismissed..... | 10 | 2 | 0 | 12 |
| Petitions withdrawn..... | 307 | 14 | 6 | 327 |
| Certificates withdrawn..... | 6 | 1 | 0 | 7 |
| Certificates disposed of by order ^c | 0 | 0 | 1 | 1 |
| Opinions rendered..... | 1,736 | 114 | 109 | 1,959 |
| Disposed of on motion to dismiss: | | | | |
| With opinion..... | 8 | 0 | 0 | 8 |
| Without opinion..... | 38 | 1 | 1 | 40 |
| Disposed of by Order setting aside findings and sentence. | 3 | 0 | 0 | 3 |
| Remanded to Board of Review..... | 138 | 6 | 6 | 150 |

SURVEY OF MILITARY JUSTICE

Table II. Court Action—Continued

| | June 30, 1961 | June 30, 1962 | June 30, 1963 |
|---|---------------|---------------|---------------|
| <i>Pending cases:</i> | | | |
| Opinions pending..... | 16 | 19 | 15 |
| Set for hearing..... | 0 | 0 | 0 |
| Ready for hearing..... | 1 | 0 | 0 |
| Petitions granted—awaiting briefs..... | 11 | 14 | 9 |
| Petitions—Court action due 30 days..... | 57 | 88 | 57 |
| Petitions—awaiting briefs..... | 25 | 25 | 21 |
| Certificates—awaiting briefs..... | 1 | 0 | 2 |
| Mandatory—awaiting briefs..... | 1 | 0 | 0 |
| Total..... | 118 | 146 | 104 |

b As of June 30, 1961, 1962, and 1963.

c New category not included in earlier tables.

Table III. Sources of Cases Disposed of by Published Opinions^d

| | Army | Navy | Air Force | Coast Guard | Total |
|-----------------------|------|------|-----------|-------------|-------|
| Petition..... | 37 | 21 | 32 | 0 | 90 |
| Certification..... | 5 | 4 | 8 | 0 | 17 |
| Mandatory Review..... | 0 | 0 | 0 | 0 | 0 |
| Total..... | 42 | 25 | 40 | 0 | 107 |

d Covers the period of the supplement, 20 October 1962 to 21 September 1963 (the entire October 1962 term); figures cover only published opinions.

Table IV. Disposition of Cases Through Published Opinions^e

| | Affirmed | Aff in Part Rev in Part | Reversed | Remanded | Dismissed | Total |
|-----------------------|----------|----------------------------|----------|----------|-----------|-------|
| Petition..... | 42 | 0 | 48 | 0 | 0 | 90 |
| Certification..... | 9 | 1 | 7 | 0 | 0 | 17 |
| Mandatory Review..... | 0 | 0 | 0 | 0 | 0 | 0 |
| Total..... | 51 | 1 | 55 | 0 | 0 | 107 |

e Period Covered: 20 October 1962 to 20 September 1963; figures include only published opinions.

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Table V. *Reversals of Special Court-Martial Cases Versus General Court-Martial Cases Considered by the Court*^f

| | Special (%) | General (%) | Total (%) |
|----------------|-------------|-------------|------------|
| Army..... | (*) | 42 (47.6%) | 42 (47.6%) |
| Navy..... | 7 (70%) | 9 (60%) | 16 (65%) |
| Air Force..... | 5 (55.5%) | 14 (45%) | 19 (50.2%) |

f Period Covered : 22 October 1962—20 September 1963; figures cover only published opinions : the purpose of this chart is to compare special court-martial cases with general court-martial cases with respect to the incidence of error found by the Court of Military Appeals. Accordingly, the figures in this chart do not include cases in which the Court of Military Appeals, although reversing board of review decisions, upheld the convictions.

g Not utilized at the present time (AR 22-145).

Table VI. *Action of Individual Judges*^h

| | Quinn | Ferguson | Kilday | Total |
|-------------------------------------|------------------|------------------|------------------|------------------|
| Wrote opinion of Court..... | 30 | 35 | 35 | 100 ⁱ |
| Concur with opinion of Court.. | 41 | 36 | 57 | 134 |
| Concur with separate opinion..... | 1 | 2 | 3 | 6 |
| Concur in result..... | 2 | 7 | 5 | 14 |
| Concur in part/dissent in part..... | 3 | 3 | 0 | 6 |
| Dissent..... | 23 | 17 | 0 | 40 |
| Total..... | 100 ⁱ | 100 ⁱ | 100 ⁱ | 300 |

h Period covered : 22 October 1962 to 20 September 1963.

i Figures do not include 7 per curiam opinions: figures cover only published opinions.

SURVEY OF MILITARY JUSTICE

By Order of the Secretary of the Army :

EARLE G. WHEELER,
General, United States Army,
Chief of Staff.

Official :

J. C. LAMBERT,
Major General, United States Army,
The Adjutant General.

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MILITARY LAW REVIEW

CHANGE }
No. 1 }

HEADQUARTERS
DEPARTMENT OF THE ARMY
WASHINGTON, D.C., 24 August 1964

DA Pam 27-100-24, 1 April 1964, is changed as follows :

Page 1, note 1. Change "MILITARY BIOLOGY WARFARE AGENTS" to read "MILITARY BIOLOGY AND BIOLOGICAL WARFARE AGENTS."

Page 2, note 3. Change "[CBR chemical . . .]" to read "CBR [chemical . . .]"

Page 3, line 10. Change "discussion" to read "discussions."

Page 10, line 8. Change "under circumstances" to read "under certain circumstances."

Page 11, note 48. Change "COMMUNICABLE DISEASES 11" to read "COMMUNICABLE DISEASES 11."

Page 84, line 11. Change "would be based" to read "would not be based."

Page 31, note 135. Change "U.S. Army Control" to read "U.S. Arms Control."

Page 43. Change sentence beginning on line 4 to read "If biological warfare is considered illegal, the principle of reprisals will authorize its use under some circumstances."

By Order of the Secretary of the Army :

HAROLD K. JOHNSON,
General, United States Army,
Chief of Staff.

Official :

J. C. LAMBERT,
Major General, United States Army,
The Adjutant General.

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